S. Hrg. 100-744

OIL SHALE MINING CLAIMS CONVERSION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 2089

TO PROVIDE FOR CERTAIN REQUIREMENTS RELATING TO THE CONVERSION OF OIL SHALE MINING CLAIMS LOCATED UNDER THE GENERAL MINING LAW OF 1872 TO LEASES, AND FOR OTHER PURPOSES

H.R. 1039

TO AMEND SECTION 37 OF THE MINERAL LANDS LEASING ACT OF 1920 RELATING TO OIL SHALE CLAIMS, AND FOR OTHER PURPOSES

APRIL 22, 1988

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OIL SHALE MINING CLAIMS CONVERSION ACT

FRIDAY, APRIL 22, 1988

U.S. Senate,
Subcommittee on Mineral Resources
Development and Production,
Committee on Energy and Natural Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room SD-366, Dirksen Senate Office Building, Hon. John Melcher presiding.

OPENING STATEMENT OF HON. JOHN MELCHER, U.S. SENATOR FROM MONTANA

Senator Melcher. The subcommittee will come to order. This morning we will have our second day of hearings on S. 2089 and H.R. 1039, which address the processing of oil shale mining claims and patents by the Department of the Interior under the General Mining Law of 1872.

We recently dealt with this issue in this subcommittee. On October 16 we held an oversight hearing on the handling of oil shale claims under the Mining Law. But frankly, the bill had not been introduced at that time. That was introduced on February 24 of this year.

Senator Wirth and I introduced S. 2089 to deal with the serious issues of public policy, relating to the disposition of oil shale mining claims. I believe the legislation addresses this problem in a manner that is both sound and fair.

Attention was focused on the oil shale problem when the Department of Interior in August 1986 settled longstanding and hard-fought litigation involving oil shale claims. Under the settlement, the United States agreed to issue patents in Colorado for $2.50 per acre. And the U.S. taxpayer received $205,000 for 82,000 acres of land.

I think it is hard, not just for me, but for everybody, to view this as anything other than a giveaway of public lands. Out of the Mining Law of 1872, claimants can obtain patents for oil shale, which grant them full fee simple title to the land for $2.50, providing certain requirements are met.

Now, that is $2.50 per acre, and admittedly that figure should have been adjusted prior to any disposition of these lands. Those provisions under the 1872 Act, and by the way that is 1872, over a century ago, include discovery of a valuable mineral deposit, performance of $100 worth of annual assessment work, and expenditure of $500 worth of labor or improvements prior to receiving the patent.

I want to go back to the first of those. That is discovery of a valuable mineral deposit, which carries with it a demonstration or some certainty or some likelihood at least of being able to extract the valuable mineral which would then be available for commerce.

And that is thought to be in the public interest. In 1872, it was thought to be in the public interest. And in 1988, that is thought to be in the public interest.

But the problem with oil shale is, when is it ever going to be extracted? And who has ever demonstrated that under anything other than $60-a-barrel oil that it would be extracted?

Now, this is pertinent, and this is one of the requirements of the Act. It is one of the reasons I do not understand the decision to go ahead and dispose of this land, because I wonder how that circumstance or that requirement of being able to demonstrate that the valuable mineral deposit is indeed a valuable mineral deposit available through any kind of processing that puts into the public commerce.

That does not seem to be the case. The people who are going to testify have some evidence on that, that it indeed would be made available.

If it could be made available, I would also like to be advised what you do with all of this shale after the oil is extracted. The last I heard, you would end up with more volume after extraction of the oil than you had before. Now, that is a little bit disturbing, because what do you do with it?

This bill or either bill, I guess, the House or the Senate bill, updates and imposes new requirements on the claimholders prospectively.

The owners of oil shale mining claims must make an election within 180 days after enactment as to whether to convert their claims to leases or to maintain their claims by performing $1,000 of annual assessment work on the claim, filing annually an affidavit of assessment work performed, and producing oil shale in significant marketable amounts within 10 years from the date of enactment of the bill.

So it is a very mild approach. S. 2089 provides a comprehensive solution for the problems associated with the claims and the patents under the Mining Law, and I believe the legislation carefully balances the rights of the public to a fair return on its resources with the rights of the claimholders.

[The texts of S. 2089 and H.R. 1039 follow:]

II

100TH CONGRESS
2D SESSION

S. 2089

To provide for certain requirements relating to the conversion of oil shale mining claims located under the General Mining Law of 1872 to leases, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24 (legislative day, FEBRUARY 15), 1988

Mr. MELCHER (for himself and Mr. WIRTH) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

To provide for certain requirements relating to the conversion of oil shale mining claims located under the General Mining Law of 1872 to leases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be cited as the "Oil Shale Mining Claims Conversion Act".

SEC. 2. Notwithstanding any other provision of law, with respect to any oil shale mining claim located prior to enactment of the Mineral Leasing Act of 1920 (30 U.S.C. 181, et seq.; 41 Stat. 437), no patent for such claim shall be issued after February 5, 1987, except for those claims for which a patent application has been filed and all requirements for a patent had been fully complied with by such date.

SEC. 3. (a) The owner of any valid oil shale mining claim located pursuant to the General Mining Law of 1872, as amended (30 U.S.C. 22, et. seq.; 17 Stat. 91) prior to enactment of the Mineral Leasing Act of 1920 shall make an election under subsection (b) or subsection (c) of this section. The election shall be made within one hundred and eighty days after the enactment of this Act. Failure to make an election within such period shall be deemed conclusively to constitute an abandonment of the oil shale claim. Not later than thirty days after the enactment of this subsection, the Secretary shall notify the owner of each such claim of the election required under this subsection.

(b) The holder of a claim required to make an election under this section may elect to convert such claim to a lease. Such lease shall be issued within sixty days after any such election and administered in accordance with those provisions of the Mineral Leasing Act of 1920, as amended, applicable to leases for deposits of oil shale, except as follows:

(1) the term of the lease shall be for twenty years and for so long thereafter as shale oil is produced annually in commercial quantities from the lease;

(2) the acreage limitations contained in section 21(a) (30 U.S.C. 241(a)) shall not apply;

(3) the first and second provisos of section 21(a) shall not apply;

(4) the limitation on the number of leases to be granted to any one person, association, or corporation contained in section 21(a) shall not apply; and

(5) the royalty shall be not less than 12½ per centum in amount or value of production removed or sold from the lease.

(c) The holder of a claim required to make an election under this section may elect to maintain the claim by complying with the mining laws of the United States and with the provisions of this Act, including the following:

(1) Notwithstanding any other provision of law, commencing with the date of enactment of this provision, on each claim $1,000 worth of labor shall be performed or improvements made during each and every year. The failure to fulfill this requirement each and every year shall be deemed conclusively to constitute an abandonment of the oil shale mining claim.

(2) Notwithstanding any other provision of law, in addition to the requirements set forth in section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744; 90 Stat. 2769), the owner of an unpatented oil shale mining claim shall file annually in the office of the Bureau of Land Management desig-

nated by the Secretary of the Interior an affidavit of assessment work performed thereon. The failure to file the affidavit shall be deemed conclusively to constitute an abandonment of the oil shale mining claim.

(3) If at the expiration of ten years from the date of enactment of this Act shale oil is not being produced in significant marketable amounts from each oil shale claim, or for the benefit of each such claim, such failure to produce in significant marketable amounts shall be deemed conclusively to constitute an abandonment of the oil shale mining claim.

SEC. 4. In addition to other applicable requirements, any person who holds a lease pursuant to subsection 3(b) of this Act or who maintains an oil shale mining claim pursuant to subsection 3(c) of this Act shall be required to reclaim the site subject to such lease or claim and to post a bond before disturbance of the site to guarantee such reclamation. Any person who holds a lease issued or readjusted pursuant to section 21 of the Mineral Lands Leasing Act of 1920 after the date of enactment of this Act shall also be subject to such requirements. The Secretary of the Interior shall promulgate such regulations as may be necessary to implement this section.

II

100TH CONGRESS
1ST SESSION

H. R. 1039

IN THE SENATE OF THE UNITED STATES

JUNE 3, 1987

Received; read twice and referred to the Committee on Energy and Natural Resources

AN ACT

To amend section 37 of the Mineral Lands Leasing Act of 1920 relating to oil shale claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

The Congress finds that:

(1) Certain oil shale mining claims were located pursuant to the General Mining Act of May 10, 1872, before enactment of the Mineral Lands Leasing Act of February 25, 1920, which provides for the leasing of that mineral.

(2) Section 37 of the Mineral Lands Leasing Act of 1920 permitted oil shale claims that were "maintained in compliance with the laws under which initiated" to be perfected under such laws.

(3) The holders of those oil shale claims that have not been patented have been afforded ample opportunity to apply for patents over the last sixty-six years but have failed to take such action.

(4) Both the Mining Act of 1872 and the Mineral Lands Leasing Act of 1920 were intended to accomplish the development of the mineral resources of the Nation, including oil shale.

(5) Almost none of the oil shale claims have been developed for their oil shale in the intervening sixty-six years.

(6) The continued existence of these oil shale claims restricts the lands from the development of other minerals which may exist on the claimed lands.

(7) The continued existence of these oil shale claims interferes with the effective management of Federal lands.

(8) Issuing patents for these claims at this time would likely result in nonmineral development contrary to the intent of the Mining Act of 1872 and the Mineral Lands Leasing Act of 1920.

(9) The lands embraced in an unpatented claim remain subject to the disposing power of the Congress until all conditions imposed by law for issuance of a patent are fully satisfied.

(10) Either the conversion of valid oil shale claims to leases or requiring diligent work toward production on such claims, together with the cancellation of invalid claims, would promote mineral development including for oil shale.

(11) It is in the public interest for these claims to be brought to some final resolution so that Federal lands affected may be properly managed for their mineral and other values in accordance with the laws and policies of the United States.

SEC. 2. AMENDMENT TO THE MINERAL LANDS LEASING ACT.

Section 37 of the Act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, and sodium on the public domain" (30 U.S.C. 181 and following) is amended by inserting "(a)" before the first sentence and by adding the following new subsections at the end thereof:

"(b) After February 5, 1987, no patent shall be issued by the United States for any oil shale claim referred to in subsection (a) except for those claims for which (1) a patent application had been filed with the Secretary of the Interior, and (2) all requirements for a patent have been fully complied with by that date.

"(c) The Secretary of the Interior shall undertake an expedited program to determine the validity of all unpatented oil shale claims referred to in subsection (a). The Secretary shall make a determination with respect to each such claim within two years after the enactment of this subsection. The expedited program shall include an examination of all unpatented oil shale claims, including those for which a patent application has not been filed. If a claim is determined to be invalid, the Secretary shall promptly cancel the claim.

"(d)(1) The owner of each unpatented oil shale claim referred to in subsection (a) shall make an election under paragraph (2) or paragraph (3) of this subsection. The election shall be made within ninety days after the enactment of this subsection. If a election is not made within such period, the Secretary shall cancel the claim. Not later than thirty days after the enactment of this subsection, the Secretary shall notify the owner of each such claim of the election required under this subsection.

"(2) The holder of a claim required to make an election under this subsection may elect to apply to the Secretary for a lease under section 21. If such an election is made the claimholder shall file an application for lease within ninety days after the enactment of this subsection. Upon receiving such an application the Secretary shall issue a lease to the owner of such claim for the area covered by the claim if the claim is determined to be valid. A lease under this paragraph shall be issued in accordance with the provisions of section 21 except as follows:

"(A) The term of the lease shall be twenty years and for so long thereafter as shale oil is produced annually in commercial quantities from the lease.

"(B) The acreage limitations contained in section 21(a) shall not apply.

"(C) The second proviso of section 21(a) shall not apply.

"(3) The holder of a claim required to make an election under this subsection may elect to maintain the claim by complying with all provisions of the mining laws of the United States regarding the maintenance of mining claims, with section 314 of Public Law 94–579, and with such additional requirements as the Secretary shall prescribe, by rule, to assure that an amount is expended annually which (A) represents diligent efforts toward the production of shale oil and (B) includes substantial work on the claim. The Secretary shall promulgate a final rule under this paragraph within ninety days after the enactment of this subsection. The annual expenditure requirement under such rule shall take effect on the first day of the first month of September which occurs more than ninety days after the enactment of this subsection. The Secretary shall review the expenditures made for each such claim not less frequently than annually. If the Secretary finds that the annual expenditure requirement has not been met, the Secretary shall cancel the claim.

"(e) In addition to other applicable requirements, any person who holds a lease pursuant to paragraph (2) of subsection (d) or who maintains a claim pursuant to paragraph (3) of subsection (d) shall be required, by regulation, to reclaim the site subject to such lease or claim and to post a bond before disturbance of the site to guarantee such reclamation. The Secretary of the Interior shall promulgate such regulations as may be necessary to implement this subsection.".

Passed the House of Representatives June 2, 1987.

Attest: DONNALD K. ANDERSON,

Clerk.

Senator **Melcher**. Senator Wallop, do you have an opening statement?

STATEMENT OF HON. MALCOLM WALLOP, U.S. SENATOR FROM WYOMING

Senator **Wallop**. John, I do. It is very brief.

Senator **Melcher**. Please go ahead.

Senator **Wallop**. I will begin by expressing my thanks to you for your willingness to schedule this hearing this morning on S. 2089 and H.R. 1039, legislation dealing with the issue of unpatented oil shale claims.

I believe that it is very important that interested parties are given the opportunity to provide their views on these measures before the Committee takes further action on them.

The issue of unpatented oil shale claims is of great interest to me, and other Members of Congress representing the states of Wyoming, Colorado, and Utah. It is my hope that this issue can be resolved in a manner which is fair and that will not merely ensure future litigation.

So again, I would like to express my appreciation for your scheduling this hearing. I look forward to the testimony of the witnesses.

I would also request at this time that the statements of Senator Armstrong and Senator Garn be entered into the record, and I also understand that Senator Hatch will be providing a statement.

And Senator Garn's statement is accompanied by—excuse me, Senator Armstrong's statement is accompanied by letters from the county commissioners of Garfield County, Rio Blanco County, and Mesa County, Colorado in strong opposition to this legislation. And I would ask that they be included in the record as well.

Senator **Melcher**. All of the statements that you have mentioned, Malcolm will be made part of the record.

[The prepared statements of Senator Armstrong, Senator Garn, and Senator Hatch follow:]

STATEMENT OF
SENATOR WILLIAM L. ARMSTRONG
BEFORE THE
SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
APRIL 22, 1988

I strongly disagree with S. 2089. The reasoning in support of the bill is inconsistent with the facts and the opinions of knowledgeable persons in the area. The Colorado counties of Mesa, Rio Blanco and Garfield are the heart of Colorado's oil shale country. All three Boards of County Commissioners have sent me strong statements of objections to these bills.

So, if we are going to amend the 1872 Mining Law, let's do it fairly and with an awareness of the rights of valid claimholders. Let's not invite more litigation -- or, possibly even worse, deprive people of their rights because they do not have enough money to protect their rights in court.

And the rhetoric supporting the bill is misleading and inflammatory. Let's set the record straight. The property in question cannot have "for sale" signs hanging over it, nor can it be involved in a "firesale" or a "land giveaway" for the simple reason that the federal government may not actually own the land. If an oil shale claimholder is maintaining a claim as required by law, that claimholder equitably owns the claim.

The $2.50 per acre is not a sale of the oil shale claim property to the claimholder. The $2.50 an acre is a filing fee paid to obtain legal title or papers for a claim already owned by the claimholder as provided by law. Also under the law presently governing these oil shale claims, a claimant has the right to mine the claim indefinitely without having to obtain legal title.

So it's not a matter of the lands "remaining in public hands" -- if these claims have been maintained according to law, then these lands are not "in the public hands". They are equitably owned by those claimholders.

Other words and phrases used to describe need for this bill arouse, but do not fairly inform, the public. Mention has been made of potential uncontrolled subdividing of patented land, the loss of any future federal mineral revenues to those counties, and environmental damage. These reasons ignore facts. Colorado has state and local land use laws. Also, the Director of the Associated Governments of Northwest Colorado states local property taxes and state mineral severance taxes will more than make up for losses in federal royalties and funds from the payments in lieu of taxes program.

In addition, state and local reclamation laws exist. And, finally, Rio Blanco and Garfield Counties, where so much of the oil shale is located, have impact mitigation ordinances to deal with socio-economic impacts of any large energy mineral developments.

The Commissioners of Colorado's three oil shale counties, Mesa, Rio Blanco and Garfield counties, have written me and I include those letters with my statement.

Ms. Maxine Albers, Chairman of the Mesa County, Colorado Board of County Commissioners says in that Board's letter, "First, we take issue with the partisan fears that have been expressed that if patented, these lands would produce no tax revenue and would become available for uncontrolled development. These are unfounded fears because state laws in Colorado provide for both state severance taxes and local property taxes for privately owned or patented land. Colorado law also provides for strong local land use controls and a state reclamation program that would prevent uncontrolled development."

Finally, if we are going to amend the 1872 Mining Law, let's do it fairly. No matter how some may object to the $2.50 an acre filing fee, or how unpalatable some may find the right to patent, the government of the United States made commitments. If these commitments are to be changed, if we are going to change the terms of the contract, then we must give the parties with whom we contracted fair notice.

I believe the integrity of the word of the United States government and fairness to valid claimholders should be a consideration. Claimholders, who in good faith have maintained their claims as required by law and directed by the courts, deserve fair notice of a change in their contracts with the government.

These bills retroactively impose a deadline of February 5, 1987 for filing patent applications. If patent applications were not submitted by that date, under this legislation valid claimholders have lost the right to patent their claims. However, I understand that some proponents of this legislation intend the provisions to also address claims for which patent applications were filed before the deadline, but for which patents have not yet issued -- so even valid claimholders who happened to file before February 5, 1987 would be denied their right to patent.

Legislation proponents noted a retroactive deadline would prevent a rush of patent applications. If there were going to be a rush of patent applications, I should think it certainly would have happened after the Tosco settlement, or since last May when the Senate imposed a ten month moratorium on the issuance of patents, but not the acceptance of patent applications. If Congress actually changes the law to state that valid claimholders will not be able obtain patents, those claimholders deserve fair notice.

The letter from Mr. Bob Richardson, Chairman of the Board of Garfield County, Colorado Commissioners discusses the increase in annual work requirements in S. 2089. "As for the [existing] due diligence requirement of $100 per year per claim and the patent fee of $2.50 per açre, it would appear that a substantial increase here would in fact penalize the small operations and that the large oil companies would be the only entities to benefit. In our opinion, the large oil companies could and would stay in for the long haul, based upon the future value of oil shale, and others would be forced out. Actual increased revenue would be miniscule by federal standards and the small operations would be unfairly burdened at best and perhaps prohibited from perfecting their claims with substantial loss of investment, at worst."

Mr. Richardson continues, "My understanding of the intent of the legislation is to correct past injustices and unrealistic pricing, but I submit that the practical result would be as described above. No one would benefit, yet the tarnished image of the US Congress would suffer the unnecessary indignity of having "welched" on a deal."

As claimed by proponents of this oil shale legislation, is this bill really fair to those who want to develop oil shale? Under S. 2089, valid claimholders could continue to maintain their claims but with no hope of patenting, or convert their claims to leases. S. 2089 states that claims converted to leases will not be extended if they are not producing oil shale annually in commercial quantities; or that at the end of ten years from enactment of this legislation, claims which did not convert to leases must be producing oil shale in significant marketable amounts. The Resolution from the Board of Rio Blanco County Commissioners best answers this. "It is transparently clear that S. 2089 amounts to a confiscation of the claims. The requirement that the claimants must produce oil from shale within ten years when the United States has not been able to produce oil from shale in seventy years is an obvious trap." Shale oil is being produced in Colorado by private industry, but it has been a long and expensive process.

Again, I urge that any changes to the mining law governing these claims be made with regard for valid claimholders. If no valid claims exist, then the land is the federal government's and this legislation is of no point. However, if valid claims do exist, then my point is we should give fair notice we intend to change the terms of this contract for certain claims, terms in existence for more than one hundred years. We are a nation of laws to which the people must be able to look for fair treatment.

REFERRED TO CK DATE 4-21-88

GARFIELD COUNTY
Board of County Commissioners

MARIAN SMITH
Glenwood Springs 81601
ROBERT J. RICHARDSON
Rifle 81650
LARRY R. SCHMUESER
Glenwood Springs 81601

COUNTY COURTHOUSE
109 8th Street Suite 300
Glenwood Springs, CO 81601-3303
Telephone: (303) 945-9158
(303) 625-5571

CHUCK DESCHENES
County Administrator

1988 APR 18 PM 5:11

April 13, 1988

US Senator William Armstrong
US Senate
Washington, DC 20510

Attention: Chris Kadlub

RE: Senate Bill 2089

Dear Senator Armstrong:

This letter is a first in my three and a half years as Commissioner for Garfield County. Our general view is that whatever happens or doesn't happen in Washington DC is beyond the influence of Garfield County, although you have always been most gracious in seeking our input.

SB2089-OIL SHALE MINING CLAIMS CONVERSION ACT is another matter, however. As the site of the largest oil shale deposit in the world as well as the site of the mothballed Exxon plant and the currently producing Unocal plant, we strongly oppose SB2089.

There are no vacant oil shale tracts left so we are discussing only existing claims, the owners of which have the absolute right in our opinion to proceed to patent under the terms and conditions as set out so long ago, and with which they have been complying. This is nothing more nor less than simple fairness which would be characterized legally as a contract right, equal protection of the law or perhaps due process.

In addition to this basic unfairness, we would submit the Bill singles out oil shale for different treatment than other minerals and the same arguments are raised in objection.

It is true the existing legislation is ancient, but all mining patent laws are not proposed for change. Just oil shale. These laws were passed to encourage settlement of the West and the concurrent exploration for minerals and those who acted upon the good faith of Congress should not now be penalized.

As for the due diligence requirement of $100 per year per claim and the patent fee of $2.50 per acre, it would appear that a substantial increase here would in fact penalize the small operations and that the large oil companies would be the only entities to benefit. In our opinion, the large oil companies could and would stay in for the long haul, based upon the future value of oil shale, and others would be forced out. Actual increased revenue would be miniscule by federal standards and the small operations would be unfairly burdened at best and perhaps prohibited from perfecting their claims with substantial loss of investment, at worst.

My understanding of the intent of the legislation is to correct past injustices and unrealistic pricing, but I submit that the practical result would be as described above. No one would benefit, yet the tarnished image of the US Congress would suffer the unnecessary indignity of having "welched" on a deal.

Our best wishes and continued support in your efforts to stop this unfair effort to penalize the very people Congress once enticed--the pioneers of oil shale technology. A technology that Congress once threw 88 billion dollars at in characteristic fashion.

Thank you.

Sincerely

Bob Richardson
Chairman

CC: Larry Schmueser
Marian Smith
Chris Trease

RJR/jrw

BOARD OF
Mesa County
Commissioners

Mesa County Courthouse
544 Rood Avenue
P.O. Box 20000-5010
Grand Junction, Colorado
81502-5010

R.W. (Bob) Holmes
District No. 1
244-1605

Dick Pond
District No. 2
244-1604

Maxine Albers
District No. 3
244-1606

Gordon Tiffany
County Administrator
244-1603

April 20, 1988

Senator William Armstrong
United States Senate
Hart Builsing, Suite 528
Washington, D.C. 20510

Dear Senator Armstrong:

The purpose of this letter is to express the views of the Mesa County Commissioners on the issue of oil shale land claims.

First, we take issue with the partisan fears that have been expressed that if patented, these lands would produce no tax revenue and would become available for uncontrolled development. These are unfounded fears because state laws in Colorado provide for both state severance taxes and local property taxes for privately owned or patented land. Colorado law also provides for strong local land use controls and a state reclamation program that would prevent any uncontrolled development.

We also take issue with proposals to establish a retroactive patent application deadline of February 1987 which we believe is a retroactive taking of claim holders rights. Also, proposals for prohibitively costly due dillegence requirements could force many claimants to relinquish their claims. This would amount to a "taking" of private property without due process, especially if these requirements are established on a retroactive basis.

The larger problem is the lack of a program for development of our oil shale resources within an overall Federal energy policy. These oil shale claimants should not be penalised for the failure of Congress to address this more important issue.

Sincerely,

Maxine Albers

Maxine Albers, Chairman
Board of Mesa County Commissioners

/dh

STATEMENT OF THE BOARD OF COUNTY COMMISSIONERS
RIO BLANCO COUNTY

Re: S.2089

The Board of County Commissioners of Rio Blanco County, Colorado, are concerned about pending legislation on the unpatented oil shale mining claims. The great majority of the unpatented claims in Colorado lies in Rio Blanco County, and Rio Blanco County encompasses the great bulk of America's oil shale, a resource with many times more oil than the Persian Gulf.

Many of the pending claims for which patent applications have not yet been filed with the Department of the Interior are held by private individuals who have been conducting assessment work on the claims for many years, and who have been on the sidelines in the more than twenty-five years of litigation conducted by the major claim owners with the United States. This twenty-five years plus of litigation have resulted in an opportunity for the claim owners to proceed with their claims, but the actions of the Congress have clouded the course of the claimants and may be forcing still more litigation and uncertainty.

Of the proposals before Congress at this time, the Rio Blanco County Board of County Commissioners, the elected representatives of the people in the area, do not favor S.2089, but do support the Department of the Interior alternative proposal, with some degree of misgiving. The Board of County Commissioners understands that the arguments and excitement over the patenting of surface interests in the claims have caused the proponents of the alternate proposal to incorporate the surrender of surface interests in these claims as a part of the legislation. The claims are approximately 70 years old, and until this spring, the surface interests were considered by all to be a part of the mining claims.

It appears to us that the Department of the Interior alternative proposal is more fair to the individuals concerned and affords them due process. We do support the reasonably prompt resolution of the status of these claims. It is transparently clear that S.2089 amounts to a confiscation of the claims. The requirement that the claimants must produce oil from shale within ten years when the United States has not been able to produce oil from shale in seventy years is an obvious trap.

There should be a reasonable resolution of the question of the unpatented mining claims. The success of the other claimants in the federal courts and the Supreme Court of the United States should not be ignored. We believe that the alternative proposal of the Department (although we feel the surface should go with claims) is a reasonable and satisfactory solution to what has remained a perplexing question.

April 19, 1988

Kenneth O. Kenney abstaining

STATEMENT ON OIL SHALE
BY SENATOR JAKE GARN

Mr Chairman, I appreciate this opportunity to testify on the on the oil shale claim issue before your subcommittee today.

Let me say at the outset that I oppose the forced conversion of oil shale claims to leases under the Mineral Lands Leasing Act of 1920. I do not believe it is necessary nor is there is any economic evidence to support such action. Forced leasing is more a short-term political reaction to a perceived problem than a thoughtful long-term solution which effectively encourages economic development of shale oil on public lands. In fact, leasing does not guarantee development. It only guarantees more litigation from those claimants whose 5th Amendment Rights under the Constitution may be denied.

According to the Department of Interior, there are 732 active claims in Utah. Several Utah claimants will be harmed if such legislation is passed, unless it contains protections for prior existing rights.

I hope the Chairman would recognize that the rights of individual claimants must be protected. I have heard all of the horror stories about a $2.50 per acre giveaway in the recent settlement agreement between TOSCO and the Department of Interior. But, that is not what I'm talking about here. I am asking for equity for the little guy who holds a claim and has done his assessment work. Even a small company deserves as much. Any legislation should include a transition period so that claimants can patent their claims if they so desire. Regardless of which course the Chairman ultimately follows, I certainly will insist that whatever changes in the law are enacted are fair and equitable to shale claimants in my state.

I thank the Chairman for this opportunity to express my views and look forward to working with him to resolve this issue.

Orrin Hatch

STATEMENT

Senate Energy Committee
April 22, 1988

Senator Orrin G. Hatch

Mr. Chairman:

I appreciate the opportunity to present testimony before your committee regarding S. 2089, which amends Section 37 of the Mineral Lands Leasing Act of 1920, relating to oil shale claims.

Mr. Chairman, I must candidly tell you that I believe any action on this legislation as currently drafted to be unwise and patently unfair to those individuals who have been operating under current law, which provides for the patenting of oil shale claims.

This legislation would change current law and prohibit existing lease holders, who had not applied for patent prior to February 5, 1987, from doing so.

Mr. Chairman, I would hope that you would seriously consider the ramifications of changing the rules midstream before moving on this legislation. There are many different and varied reasons that oil shale leases have not been patented. Yet, regardless of the reasons, I think the more important issue is the integrity of the process. If a change is to be made in this law, it should certainly give existing lease holders the opportunity to patent their claims, should they so desire.

Mr. Chairman, I believe that several efforts are underway to identify and formulate a legislative proposal which would address your concerns but would protect the right of claimants to go to patent on their claims under a very specific set of restrictions. I would hope that these efforts are successful, because I think there is some room for discussion on this point.

Mr. Chairman, again, I appreciate the opportunity to offer these remarks and would encourage the Committee to address this issue in such a way that those claimants wishing to patent their claims (and not all of them will) may do so, that the rules of the game will not be changed in the middle of the process and that the policies of the United States government will be fair and equitable to those who have followed the rules.

Senator **Melcher**. Senator Wirth.

STATEMENT OF HON. TIMOTHY E. WIRTH, U.S. SENATOR FROM COLORADO

Senator **Wirth**. Thank you very much, Mr. Chairman. I think it is very timely to have these hearings, and I hope that we can move on S. 2089 and H.R. 1039 or some combination thereof.

It defies my sense of fair play and common sense that somehow the Federal government would sell land at $2.50 an acre. No matter how one goes about trying to figure out how to rationalize that, technically or legally or historically, it just does not make sense.

And my sense of fair play is particularly abridged when many of the people who bought that land turned right around and sold it for $250 an acre.

It seems to me that this kind of speculation is simply not what the people who put together the 1872 Mining Law had in mind, and certainly the review of the history of that law suggests that that precise kind of speculation was something they did not want to encourage.

It seems to me that S. 2089 also focuses on and takes care of the concerns related to wildlife and wildlife management. There are a lot of people in western Colorado who use these public lands, and are now denied access to those that were sold at $2.50 an acre.

As we all know, this is habitat for one of the largest mule deer herds in the country, and that has to be managed for the uses of a lot of people, not the handful of people who happen to end up with a very good deal on this.

Finally, it seems to me, this legislation ensures that ranchers on the Western Slope will not lose their grazing permits, as oil shale claims go to patent.

Now, it seems to me that we have a way of working out all of this in this legislation. I think you have done a very fair job, and I hope that we can come to a speedy resolution of this and move it through and have it become public law.

Thank you very much, Mr. Chairman. I am glad that we were able to put together a good piece of legislation, and I hope that we can have it become a law very soon. I have a full statement which I would like to have included in full in the record.

Senator **Melcher**. Yes, it will be part of the record, Senator.

[The prepared statement of Senator Wirth follows:]

STATEMENT OF THE HONORABLE TIMOTHY E. WIRTH

REGARDING S. 2089, THE OIL SHALE MINING CLAIMS CONVERSION ACT

April 22, 1988

Mr. Chairman, I want to thank you for scheduling these hearings on S. 2089 and H.R. 1039.

For more than 60 years, the courts, the Congress, and the Department of the Interior have been debating the future of oil shale mining claims that blanket hundreds of thousands of acres of public land in Colorado, Wyoming, and Utah. During that 60-year debate, each of the three branches of government has made its share of mistakes.

The 1927 decision by the Department of the Interior -- the Freeman v. Summers case -- was the first mistake, and we are still living with its consequences. I don't believe there was ever any reason to treat the discovery standard for oil shale any differently than we deal with the discovery standard for other minerals. Either a miner has discovered a valuable mineral deposit that can be commercially developed, or he hasn't. Freeman was a stark and inappropriate departure from the clear standards of the prudent man test that has guided the Department in evaluating discoveries for every other kind of mineral. And to its credit, in the 1960s, the Department recognized the error of its ways and since then has been trying, off and on, to bring oil shale back into the mainstream of the mining law.

In the 1930s, the Congress started an investigation of the very suspicious circumstances that surrounded the Freeman decision. That was an appropriate response, and Congress's inquiry certainly would have justified a clear statement that Interior had been wrong in setting up a unique and unwise standard for oil shale claims. But Congress's reaction was ambiguous.

And throughout this time, the federal courts have been remarkably lenient with oil shale claims. Even worse, some of the decisions, such as the 1985 district court decision in TOSCO v. Hodel would have "eviscerated the mining laws of the United States," in the words of the Department of the Interior's Regional Solicitor.

That leaves us, more than 60 years after the Mineral Leasing Act was enacted, with oil shale claims that are no closer to being commercially developed than they were in the 1920s. Sixty years after those claims were filed, we still are waiting for a thorough investigation into what the Department of the Interior itself said was "an open invitation to fraud." It was the Department that concluded that there was evidence "sufficient to constitute proof that hundreds, if not thousands of oil shale claims, many of which have since gone to patent, were fraudulently located."

It is time that we brought this controversy and this debate to an end. The legislation being considered today by this Subcommittee would do that. This legislation would give the claim holders the option either of maintaining their claims under the Mining Law of converting their claims to a lease. But this legislation would forever bar the Department from issuing patents for these lands.

That is a fair compromise. It protects the rights of the claim holders, who say they want to develop these claims. And it is fair to the people of Colorado. This legislation ensures that ranchers on Colorado's west slope will not lose their grazing permits as oil shale claims go to patent. This legislation ensures that the Colorado Division of Wildlife will be able to manage the North American continent's largest mule deer herd, as well as the elk and mountain lion and other wildlife that rely on these public lands for their habitat. And this legislation ensures that the public will be able to use these lands for hiking, hunting, and camping -- since they will continue to be "public" lands.

Some of the witnesses today will argue that this legislation violates the Fifth Amendment of the Constitution. That simply is not the case. There is no vested right to a patent. In the past, Congress has cut off the right of mining claim holders to apply for a patent, and the courts have upheld those laws. This bill is no different from those earlier laws.

And certainly Congress has the right to require that miners who develop mineral deposits on the public lands have to reclaim their mining sites.

Finally, this legislation establishes a "due diligence" requirement for these miners. Again, Congress certainly has the power to do that -- and we should do that. The purpose of the 1872 Mining Law was to encourage development of mineral resources on the public lands, not to encourage 60-year speculation in oil shale.

S. 2089 is a sound bill, Mr. Chairman, and I am pleased to be a cosponsor. I look forward to working with you in the weeks to come. I hope that we can proceed with dispatch to mark this bill up in full Committee, and then take this bill to the floor.

This is good legislation for Colorado, and it is good legislation for the country. My only regret is that it took Congress so long to get to this point.

Senator MELCHER. Our first witness is from the Administration, Mr. James Cason, Deputy Assistant Secretary for Land and Minerals Management, Department of the Interior.

Mr. Cason, welcome to the Committee. I have looked through your testimony. I am going to let Senator Wirth conduct these hearings for a few minutes while I meet on some other matters back in the library, what we call the library here.

But I note that in your testimony you take a rather narrow construction of Supreme Court cases, in your assertion that the bill might be considered as a taking.

I might also note that we would not even be involved in all of this if Justice and Interior Solicitors had done what they were being recommended to do by professionals in the field up there who lived with the situation for 20 years or longer, in not appealing the case.

Because in the settlement that you arrived at, I think misguidedly and outrageously, the patents that were going to be produced equal 70 billion barrels. Maybe you have an explanation for that, giving a patent for $2.50 an acre.

STATEMENT OF JAMES E. CASON, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. CASON. Senator, you are correct, that if we had appealed we would have managed to delay the inevitable for another period of time.

Senator MELCHER. Well, you might have got a Supreme Court decision, which might have advised you, as it does from time to time, as it advises Congress from time to time.

Mr. CASON. I would like to start at a different point, but just to close on that one.

Senator MELCHER. Well, you can start in 1872 then, that is a good point for you to start.

Mr. CASON. That is probably a good point. I believe my testimony has been submitted for the record.

Senator MELCHER. Yes, it has.

Mr. CASON. Thank you. I would like to start my testimony by telling a little story.

The story is about the four blind men who have the opportunity to touch an elephant. One blind man gets led to the tusk of the elephant, another goes to its ear, a third goes to its rear leg, and the fourth goes to its tail.

And in touching the elephant, each blind man in turn is asked what they feel. The first felt a large round smooth stone, the second felt a large leaf, the third felt the trunk of a very rough tree, and the fourth felt the skin of a very rough snake.

If we had the opportunity to open the eyes of the blind men, they would all see that they were feeling different parts of the elephant. The reason I tell the story is that we are dealing with the same issue here that we all seem to be approaching from different perspectives.

We do have a set of agreements between Congress, the Administration, the Judiciary, and the claimants on how they are going to manage their claims. All of those things are in writing, but we all seem to have very different interpretations of what all the writing means, and how it is to be interpreted.

I have had the opportunity, through some very intensive briefings on this issue, to have my eyes opened somewhat, and I believe I see the elephant. And in seeing the elephant, I think what we have is a very large gray issue that we need to manage carefully and prudently.

So I would suggest that we all try to approach it with a recognition of its history. Whether we like what the history says or not is a separate issue.

But the history is there, and we must try to understand what rights have been acquired by the claimants over time, and then make a separate decision about what the objective of Congress is in dealing with those rights once they have been determined.

I would like to start out by saying that there are certain things that one must do to have a valid mining claim, whether we are talking about oil shale or any other mining claim.

The first thing that one has to do to have a valid mining claim is to have located the claim on land open to entry. The Department of the Interior has gone through the process on oil shale claims of going back and taking a look at the land that they were staked on, to ensure that the lands were open to entry.

And in the cases where we have found that the lands were closed to entry, we have gone on to invalidate those claims. So right now we have moved the issue down to those claims that were filed appropriately on land open to entry.

The second thing you need to do to have a valid mining claim is to have discovered a valuable mineral. And there is a certain standard in the oil shale community for what constitutes a valid discovery.

The Department of the Interior used this standard between 1935 and 1960 to patent 350,000 acres of oil shale, and currently we are attempting to use the same standard for addressing the remaining acres of oil shale.

There is a third standard that the mining claimant had to have made an investment. Under the 1872 Mining Law, one has to have invested at least $500 into the claim. That is a minimum investment.

And there is the requirement to do annual assessment. The annual assessment has two principal objectives—one is diligence, and the other one is to protect against rival locaters.

So if you look at the oil shale claims in the context of 1920, the claimant had to have made a discovery as of 1920, and is basically guaranteed rights to the claim. These are possessary rights as of 1920.

The only thing that can happen to the claimant between 1920 and now is the potential of losing his rights. He does not gain any more.

If the claimant has a valid mining claim, he does have possessary rights to the claim under the law. And those rights include the right to disposal, extraction, the use of all minerals, and the use of the surface for purposes incidental to mining.

Wilbur v. *Krushnic,* a 1930 Supreme Court decision, stated that valid mining claims are property in the fullest sense of the term, and may be sold, transferred, mortgaged, and inherited without any prejudice to the United States.

As to the oil shale claims that are subject to this hearing, the Department of the Interior has made many efforts to look at the underlying criteria of a valid mining claim and has sought several times in the last 70 years to invalidate claims.

We had some discussion at the last hearing about the efforts that we have made. Some of those efforts, such as the effort to invalidate claims for being located on land closed to entry, have been successful.

Other efforts on the part of Interior to contest claims for lack of assessment work or contest claims for lack of discovery have not been successful. We have had some discussion about what success means, and I am sure we will have more today.

A principal criteria to remember is in the oil shale arena, if you had a discovery prior to 1920, you had vested possessary rights as of that time. This is not an issue where people gained rights over the last 70 years.

One of the things that we need to take a look at in making the decisions on S. 2089 and H.R. 1039 is that appears to be the implication in some of the discussions that there is an implicit decision that somehow the Mining Law requires that one develop the claim to the point of commercial application.

That is not consistent with the Mining Law as I understand it. There is a requirement to invest $100 per year in developing the claim, but it does not mean that the claimant has to go out and set up a mining operation and bring it to commercial production. There is no requirement to do that.

I think S. 2089 implies that there is some requirement to do it, and a diligence requirement has been placed in this new law. It is something that we have to give consideration to.

Additionally, the Supreme Court has twice taken a look at whether this is a valuable mineral or not. I heard in some of the opening statements there is some question about this because of the 70-year history without commercial production.

The Supreme Court, in *Freeman* v. *Summers* in 1927 made a determination that, in fact, oil shale was a valuable mineral, and that hypothesis was tested again in *Andrus* v. *Shell* in a 1980 Supreme Court decision.

In 1980, the Supreme Court decided that current marketability was no bar to patenting of oil shale claims. So I think this is something that is important that we have to understand.

Getting into the bill itself, I think S. 2089 offers only two options, and an implied option, to the claimants.

The first option, Section 3(b), gives the mining claimant the option to lease. I think it is important to understand that when one exercises the right to a lease, or the option for a lease, that, implicit in choosing that option, is that one has to give up his possessary rights to get it.

Now, whether you call that voluntary or forced confiscatory action is beyond my decisionmaking power. But you have to give up your possessary rights in order to get the lease.

What we have is a situation, if the claimants had a valid discovery and a valid mining claim as of 1920, the claimants are being asked to give up those rights they have protected for 70 years in favor of a lease in an economic time where the development of a lease is not prudent.

The second option in 3(c) is that you can continue your claim. However, under this option, one is required to invest $1,000 a year, instead of today's $100 a year; there is no opportunity for a patent; and there is a new requirement for diligent development in commercial quantities.

I think it is pretty well known at this point in time, as was pointed out in the opening statements, that there is no current market for oil from oil shale because of its relative expense, and there is no current technology that could produce oil from oil shale at a price that can be brought to market for profit.

So this option in the foreseeable future does not appear to be one that would be prudent on the part of the oil shale claimants either.

If we go to option 3(d), which is not in the legislation but implied, the option in 3(d) is, for the claimants, just to make it easy on everybody and give up their claims voluntarily. Somehow I do not feel that that is a very smart thing to do.

If you take a look at the bill in its entirety, the impression that we within the Department have from the bill is it gives the oil shale claimants, who have protected their rights for 70 years, the same option that a man at a hanging might have; and that is, do you want a new rope or an old rope?

The results are the same, you get hung. In this case in S. 2089, the claimants end up with very little of the rights that they have been garnering for the last 70 years, or garnered 70 years ago.

It appears to the Department that clearly the objective of S. 2089 is no more than a cleverly disguised means of forcing the claims to be forfeited to the government. That is unfortunate. We do not believe that is good public policy, but that appears to be the objective.

Certainly the objective is not oil shale development because I think everybody in this room knows that there is no current technology to bring the oil shale to market at a profit today. And it does not appear likely in the foreseeable future.

The next issue that seems to be on the table for discussion during the hearing is whether this bill would constitute a taking.

Certainly, I am not an attorney. I do not purport to be. The best I can do is give you the perceptions from the briefings that I have had within the Department.

The Solicitor's office in the Department, and the people that we have talked to at Justice, have two concerns on the taking issue.

The first is they have a concern that I do not talk about it very much for fear that we will build a record that could be used against us in the future.

But second, they do have an opinion that this does constitute somewhat of a taking, but it is impossible at this time to determine just how much.

In taking a look at how we would approach takings on this issue, let me just quote from *Skaw* v. *U.S.*, a 1984 case. It says, "the analysis of whether a particular regulatory act, or you could call this a legislative act, constitutes a legislative taking remains one of the most troublesome line-drawing exercises in the judicial function, characterized by a few basic precepts and the admonition that each case turns on its own particular facts."

So we can all sit and speculate about whether a taking is going to happen in this case or not. But frankly, none of us are in a position to make the decision. Eventually it will be the facts and the history of the matter, and the intents that we all have, that will go to court and be determined by a judge somewhere else.

The 1979 Supreme Court decision of *Kaiser* v. *Aetna*, talks in terms of what you take a look at for a Congressional taking.

It says, given the difficulty in defining an un-Constitutional or compensable taking, I believe the best approach is a simple one. Merely consider the bill in the light of the factors described in the Supreme Court 1979 Kaiser v. Aetna decision.

The Supreme Court stated three factors which should be closely examined to determine whether a legislative taking compensable under the fifth amendment has occurred. The three factors are the character of the government action, interference with reasonable investment expectations, and economic impact.

I would like to take just a second and talk about those three criteria as a perception of the weakness we may potentially have for takings.

As far as the economic impact, if you take a look at the options of the bill, we believe that the options create an array of end expectations that are far different than what the claimants have currently.

Currently, if I can develop——

Senator **Wirth**. Can you give me a feeling of how long you are going to go? We are going to have a vote at 11:00 and have a number of other witnesses as well.

Mr. **Cason**. About five minutes and I should be finished. Is that all right?

Senator **Wirth**. The faster the better. There are a lot of other people who want to be involved in this as well.

Mr. **Cason**. Thank you. In the economic impact area, if one started with an expectation that you had a patented claim, certainly a patented claim would be more attractive and economically valuable than a patentable claim.

A patentable claim would be much more valuable than a claim that has $100 assessment work requirement, and can be continued in perpetuity. A claim of that nature would be much more valuable than a claim that has a $5,000 or $1,000 assessment requirement, and has a 10-year diligence requirement.

So I think it would be fairly easy to point out there is an economic impact associated with making a different decision.

Second, if we talk about investment expectations, we have claimants that staked these claims prior to 1920, and have been continuing an investment in these claims since 1920.

They have invested in these claims because they had an expectation of being able to receive a patent at the end, if they had a valuable discovery and met all the tests.

I think at this point it would be important to point out that there is a principle in the Mining Law that says, a valid unpatented mining claim carries with it a right to the issuance of a patent by the United States, conditioned upon the performance of statutory requirements.

If the statutory requirements are met, the right to have the patent issue is absolute and not discretionary with the United States.

The fact that many years elapse after the original location of the mining claim does not affect its validity. There are no obligations to apply for a patent. So we are interrupting that investment expectation on the part of the people.

The third, criterion is public purpose. It is hard for me to understand what the public purpose is that we are trying to serve by trying to confiscate the rights of these individual claims.

At best, what they do is add additional acreage to the Federal estate, a Federal estate that already encompasses one-third of the United States. It is hard to argue that there are other rights such as national parks or wilderness areas or other public purposes to be served.

Therefore, in conclusion, it appears that the purpose of the legislation is to eliminate the possessary rights of these claimants.

If we end up creating a situation where compensatory taking does take place, the next thing that we have to take a look at is the risk of compensation that we engender.

That risk could be from one end of the spectrum of what the fair market value of the land in a local sale would be, say for instance $500 an acre, to the other end of the extreme that we got from the House investigative report that estimated this oil shale land was worth somewhere between $500,000 and $3 million per acre.

I do not think it is prudent on our part to unnecessarily expose ourselves to this risk of compensation without knowing.

We in the Federal Government have, in all three branches, created an expectation on the part of the claimants, a set of rules that they were to play by. They have played by those rules, the ones that have a valid mining claim, and we are in a position now where we are trying to rewrite history in order to take those claims from those people.

We in the Department have worked with Congress; we have tried to work with Congress; we have worked with the claimants to try and find an equitable solution. We are willing to continue to do that. Thank you.

[The prepared statement of Mr. Cason follows:]

APR 22 [illegible]

STATEMENT OF JAMES E. CASON, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION, COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, ON S. 2089, A BILL "TO PROVIDE FOR CERTAIN REQUIREMENTS RELATING TO THE CONVERSION OF OIL SHALE MINING CLAIMS LOCATED UNDER THE GENERAL MINING LAW OF 1872 TO LEASES, AND FOR OTHER PURPOSES".

I appreciate the opportunity to appear before the Subcommittee today to discuss the Department's views on S. 2089. We are pleased that the Subcommittee is conducting this hearing and addressing the issues involving oil shale mining claims.

Oil shale mining claims have presented the Department of the Interior with some very difficult issues. These issues have eluded definitive solution for 68 years. Although the mining claims have been in existence for nearly 70 years, policy debates and litigation often delayed the Department from taking final action on a significant number of claims. Basically, the history of oil shale mining claims has been the history of the executive, legislative and judicial branches of government wrestling with the actions required of an oil shale mining claimant in order to maintain the claims and go to patent. There is no clear, unequivocal interpretation of law to serve as a guide to the claimant and the Federal administrator so that all remaining claims can be handled consistently and equitably, with due recognition of any legal rights which may have enured to the claimants.

Although all three branches of government have addressed the issues surrounding oil shale mining claims, no definitive solution is in hand. We are willing to work with the Subcommittee to resolve its concerns as well as those of the Administration. Our objectives in setting out a legislative solution to these long standing issues are to:

- establish finality and certainty for the claimant and the Federal administrator;

- ensure that the equities of the claimant that have accrued over time are recognized and protected;

- eliminate time consuming and costly litigation; and

- establish an administrative process that is manageable by the Federal Government at a reasonable cost.

S. 2089 would result in a significant change with regard to the legal rights of the claimants, gained through good faith location, recordation, discovery of valuable deposits, and maintenance of one's mining claim. The bill would not recognize the long history of the Federal Government's dealings with oil shale matters.

Let me review the key elements of the mining law in the context of oil shale mining claims.

Location

To establish rights to oil shale under the mining laws, one's claim must pre-date the Mineral Leasing Act of 1920. Oil shale was properly located as placer mining claims in rectangular form by legal subdivision. State law controls as to the form of monumentation and posting of notice on the ground. Basically, given that all oil shale claims are more than 68 years old, the veracity of the original locators is difficult to challenge and must be accepted at face value unless compelling evidence dictates otherwise.

Recordation

Recordation represents the initial filing of a notice of a claimant's interest in a valuable mineral deposit within the limits of a mining claim and the annual filing of affidavits of labor performed. Historically these filings were made only with the county. With the passage of the Federal Land Policy and Management Act, the requirement to file a notice of location and to make annual filings of affidavits of labor (or notices of intent to hold) was expanded to include a filing of both documents with the Bureau of Land Management (BLM).

Failure to make the initial filing with BLM as required by FLPMA voids the claim. Any oil shale mining claims not filed initially, as required, by October 22, 1979, ceased to exist as of that date. Annual filings are monitored by BLM and any lapse conclusively voids the claim.

Discovery

The discovery of a valuable deposit of minerals is the most fundamental aspect of the mining law. Without discovery, there is no vesting of rights in the land.

During the 1920's the Department began patenting oil shale claims on lands of the Green River Formation, initially, where there was rich oil shale at the surface, and subsequently, where only lean beds were exposed which led to the inference that richer deposits were present at depth. This standard was delineated in a 1927 Departmental decision, Freeman v. Summers, wherein the allowance of geological inference was first established, and the prospective value of oil shale was held to be sufficient for patenting.

Not surprisingly this relaxed standard met with controversy. However, after the Senate Committee on Public Lands and Surveys, in 1931, examined the Departmental discovery standard as set out in Freeman v. Summers, the Committee Chairman, Senator Nye, advised the Department to proceed with patenting under this standard. From 1931 to 1960, the Department followed this policy. Five hundred twenty-three patents covering almost 350,000 acres were issued during this period.

In 1961 the Department changed its policies. DOI began to impose a more restrictive discovery standard placing emphasis on the lack of profitability of producing shale oil, that is, requiring a showing of the likelihood that a claim could be operated with a reasonable prospect of success as a commercial venture. This more restrictive discovery standard was rejected in 1980 by the Supreme Court in Andrus v. Shell Oil Co. when the majority held that Freeman v. Summers was the correct interpretation of the intent of the savings clause of the Mineral Leasing Act.

Maintenance (Annual Assessment Work)

The obligation to perform assessment work is the other major controversy associated with the management of oil shale mining claims since the passage of the Mineral Leasing Act of 1920. The savings clause of the Act required oil shale mining claims to be maintained in accordance with the mining laws. Under the mining laws, to hold a claim, a claimant must perform at least $100 worth of assessment work per claim each year. The purpose of this provision was to encourage diligent development of the claim. Failure to perform this labor allows relocation of the claim by rivals, unless labor is resumed first. This qualification is called the resumption principle and serves to bar adverse actions against the claim.

In the 1920's and early 1930's, the Department contested a number of oil shale mining claims for failure to do assessment work. These contests resulted in two Supreme Court decisions adverse to the Department. The first, Wilbur v. Krushnic (1930), held that the government was barred from contesting a mining claim for failure to perform annual assessment work as long as the claimant resumed performance prior to the contest. The second, Ickes v. Virginia-Colorado Development Co.(1935), held that the government could not contest the claims for failure to perform assessment work. As a result of these adverse court decisions, the Department reversed its decisions invalidating claims for lack of assessment work, and from 1935 to the early 1960's, issued patents to approximately 350,000 acres of land regardless of whether assessment work was done, continuing to use the Freeman v. Summers precedent to verify the discovery of a valuable oil shale deposit.

In 1960, the Department changed its policy regarding assessment work requirements. The Department began rejecting patent applications for oil shale claims that it deemed invalid due to lack of assessment work. Plaintiffs in the recent TOSCO litigation challenged, in part, decisions invalidating their claims under this policy. These plaintiffs first brought suit which resulted in a District Court decision in their favor in 1966 that the Department lacked authority to contest the claims for lack of assessment work. This decision was affirmed by the Court of Appeals in 1969 and in 1970 the case came before the Supreme Court. The Supreme Court, in Hickel v. TOSCO, held that the Department could contest claims where a claimant failed to "substantially comply" with the assessment work requirement. The Supreme Court however did not define the term "substantial compliance" nor did it indicate any guidelines for developing a definition. Instead the Supreme Court remanded the case to the District Court to allow the applicants to bring their claims "within the narrow ambit meaning" of Krushnic and Virginia-Colorado Development Corp. Judge Finesilver, in deciding Tosco v.

Hodel, held that this "narrow ambit" includes the holding in Krushnic that the resumption principle operates against the Federal Government as well as against rival locators. In fact, the government recognized the validity of this principle in the written arguments filed with the Supreme Court in the TOSCO case and expressly stated that it was not seeking to overturn it.

In 1972 the Department provided constructive notice alerting all mining claimants that their claims were subject to cancellation for failure to substantially comply with annual assessment requirements (43 CFR 3851.3[a]). Since 1972, the Department is in a better position to contest claims because of nonperformance of annual assessment work, subject to the constraint of the resumption principle.

The mining law (30 U.S.C. 28) provides relocations (i.e., claim contest action) must occur while the claimant is in default of his annual obligation in order to effect a forfeiture of rights. The Department must therefore initiate contest action before a mining claimant resumes his labor or be barred from contesting the claim on this basis. In other words, as the Supreme Court held in Wilbur v. Krushnic (1930), the government may not take advantage of a past lapse of assessment work when resumed prior to initiation of the contest.

The Department will accept the affidavits of assessment work filed annually since 1979 under section 314 of the Federal Land Policy and Management Act (FLPMA) as factual unless compelling evidence to the contrary is presented.

Affidavits of assessment work filed with the Bureau of Land Management in 1979, and thereafter for all but 108 oil shale claims, attest that such labor has been resumed. Filing under FLPMA of a notice of intent to hold a mining claim creates no such presumption of performance of labor. Therefore, the filing of notice of intent to hold a mining claim is presumptive, but not conclusive, that there has not been substantial compliance with the obligation to annually perform labor, or make improvements, valued at not less than $100 per claim.

As a policy change, we have exercised our option as a "rival locator" to contest these claims during this presumed lapse of annual assessment work, in keeping with the constraints imposed by the resumption principle. The recent contesting of those 108 mining claims for which no affidavits of assessment work were filed for the last 2 or more years demonstrates that we will insist upon the statutory minimum amount of annual assessment work performance, and will police compliance via the FLPMA annual filing requirements. We will in the future continue to inquire into alleged nonperformance of assessment work obligations through the initiation of contest proceedings, when and if notices of intent to hold, rather than affidavits of assessment work, are filed for two consecutive years. We must wait for at least a 2 year lapse of assessment work because of the precedent set by Wilbur v. Krushnic and Ickes v. Virginia-Colorado Development Corp. that a 1-year lapse is insufficient to permit contest by the government. These two decisions were expressly not overturned by the Supreme Court in Hickel v. Tosco, thus the Department is bound by their holdings, despite the fact that this decision stated that the Federal Government had broad power to contest claims on this basis.

With this background, we can see that persons who established proper location, made a discovery, and protected against rival locators are entitled to the possessory rights associated with a valid mining claim. S. 2089 would not recognize the claimants' rights and would prohibit the issuance of any patents after February 5, 1987, except for those claims for which a patent application had been filed and all requirements for a patent had been fully complied with by that date. It would be unfair to the claimants to suddenly and retroactively change the rules and greatly diminish their rights after 68 years of maintaining their possessory interests.

We note that S. 2089 contains the term "valid oil shale mining claim". However, the bill provides no guidelines as to what constitutes a valid claim. Given the controversy outlined above it seems prudent to define the showings necessary to satisfy the test of discovery and to clarify the meaning of "substantial compliance."

I have attached to this statement a substitute draft for S. 2089 that we believe would establish finality and certainty for oil shale claimants and the Federal Government. Section 6 of the draft bill would adopt the concepts of the Supreme Court-sanctioned Freeman v. Summers discovery standard and would reiterate the resumption principle for assessment work which are the two major issues in dispute over the meaning of "valid oil shale mining claim."

The substitute bill has been reviewed by claimants or their representatives. From those discussions, we believe that the claimants would be willing to forego a patent to the surface estate in return for an opportunity to obtain absolute title to the oil shale deposit without costly litigation and uncertainty. We believe their willingness to receive a lesser estate than that provided by current law demonstrates frustration that results from years of litigation. In the search for certainty, the claimants may be willing to compromise rights currently possessed.

S. 2089 would require the owner of a valid oil shale mining claim to make an election either to convert the claim to a lease or to maintain the claim by complying with the mining laws and the additional burdensome requirements. A valid mining claim carries with it a full bundle of rights, and S. 2089 would grant a clearly lesser set of rights. The undefined reduction would raise the issue of taking without just compensation.

Careful review is urged to prevent unnecessary takings. We should be sensitive to the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public.

The holder of a mining claim -- which has been located, maintained in accordance with the law, and on which there has been a discovery of a valuable mineral deposit -- has a property right protected by the Fifth and Fourteenth amendments to the Constitution. S. 2089 would provide no viable alternative to a lease. To maintain a claim without opportunity to receive patent, and to perform ten times the annual labor required of other mining claimants only to see the claim expire 10 years after enactment because commercial production of shale oil could not be achieved is grossly unfair. On the other hand, conversion to a lease, with attendant rent and royalty provisions, is no better. There is no provision for compensation of claimants in S. 2089 and, therefore, there are questions as to its constitutionality.

S. 2089 would severely curtail incentives for investment in oil shale operations on these lands, either under conversion leases or unpatented claims. Surely no one today expects commercial development of shale oil within 10 years when conventional oil prices hover at $17/barrel. This bill imposes a requirement to invest not less than $10,000 per claim with the knowledge that one's labors are likely for naught. This requirement of demonstrated commercial production is much more stringent than the requirement generally imposed upon mining claimants to establish a reasonable likelihood of success in developing a valuable mine. For those claimants electing to convert to leases, S. 2089 would remove the Secretary's authority to waive rent and royalty payments for the first 5 years of an oil shale lease to encourage production. We believe that the existing waiver discretion should be retained.

The remaining unpatented oil shale mining claimants have complied in good faith with the direction provided by the Department of the Interior, the Congress, and the courts. If S. 2089 were enacted as written, Congress should expect litigation from those claimants that are able to afford the extensive legal costs. Past litigation has cost claimants and government millions of dollars. Individual oil shale claimants would likely be unable to muster the financial resources to continue the battle.

It is axiomatic that development of a privately held mineral resource will proceed sooner and more quickly than one controlled by the Federal Government with its attendant regulatory roadblocks. This is the case with oil shale, too, as the only operating shale oil retort in the Piceance basin is supplied with ore from private land, not Federal leases.

If S. 2089 were passed in its present form its effect on claimants' rights would be too onerous and not consistent with the Fifth Amendment as related to takings. Therefore, we strongly oppose S. 2089. It is our earnest desire to work with the Subcommittee in a cooperative spirit to come up with a legislative approach that would meet the objectives I previously mentioned.

This concludes my statement. I will be pleased to answer questions.

A BILL

To provide for the expeditious and equitable resolution of oil shale mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the "Oil Shale Lands Act of 1988".

Sec. 2. Congressional Findings.

The Congress finds that:

(1) Certain oil shale mining claims were located pursuant to the Mining Act of May 10, 1872 (17 Stat. 91), and the Act of February 11, 1897 (29 Stat. 526), before enactment of the Mineral Leasing Act of February 25, 1920, which provides for the leasing of that mineral.

(2) Section 37 of the Mineral Leasing Act of 1920 permitted valid oil shale mining claims that were "maintained in compliance with the laws under which initiated" to be patented under such laws.

(3) The owners of many of those oil shale claims that have not been patented have equitable and legal rights which have vested over the years.

(4) The issues involved in oil shale claims have resulted in controversy, protracted litigation, and confusion in interpreting the application of the mining law to oil shale ever since the enactment of the Mineral Leasing Act of 1920.

(5) The owners of unpatented oil shale claims have many times over the years professed a desire to obtain commercial development of oil shale when market conditions warrant.

(6) Although development of oil shale is not commercially practical at this time, it is not in the public interest to subject the persons who have held mining claims since prior to 1920, or their successors in interest, to continuing controversy or the expense of litigation in order to obtain title to the oil shale that forms the basis of their claims.

(7) It is desirable and in the public interest that Congress establish a finite program and authorization for recognizing rights enuring from the mining laws and for issuing patents for those rights.

(8) Although the mining laws contain provisions relating to determination of validity of mining claims and issuance of patents, the unusual history of the handling of oil shale mining claims located before 1920 necessitates the enactment of special legislation designed

to address and resolve the controversy relating to those claims by allowing current owners to obtain title to the oil shale and thus encourage their efforts to develop commercial oil shale technology.

SEC. 3. Definitions. As used in this Act:

(a) The term "oil shale mining claim" means an oil placer mining claim located under the mining laws prior to February 25, 1920, for oil shale, which has not been adjudicated.

(b) The term "valid oil shale mining claim" means an oil placer mining claim which was located and on which a discovery was made under the mining laws prior to February 25, 1920, for oil shale, which has been maintained in accordance with section 37 of the Act of February 25, 1920 (30 U.S.C. 193), including compliance with section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

(c) The term "claimant" means any person or other entity who owns all or part of the legal title to an oil shale mining claim and who has recorded this ownership interest with the Bureau of Land Management under section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

SEC. 4. Filing Notice of Applications for Patent.

(a) Time Limit for Filing Notice for Patent Application. Within 1 year from the date of enactment of this Act, a claimant shall file with the Secretary of the Interior for each oil shale mining claim either a notice of intent to file an application for patent or an application for patent.

(b) Failure to File. Failure to file a notice or application as required by subsection (a) of this section shall be deemed conclusively to constitute an abandonment of the entire mining claim by operation of law.

(c) Pending Applications. The requirement of subsection (a) of this section does not apply to an oil shale mining claim for which a patent application is pending with the Department of the Interior on the date of enactment of this Act.

(d) Other Requirements. The provisions of subsection (a) of this section shall be in addition to the requirements of section 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744).

SEC. 5. Filing of Applications for Patent.

(a) Filing Requirement. An application for patent shall be filed within 3 years of the enactment of this Act for every oil shale mining claim for which a notice of intent to file an application for patent was filed with the Secretary in accordance with section 4(a) of this Act.

(b) Failure to File. Failure to file a patent application as provided in subsection (a) of this section for any oil shale mining claim, valid or otherwise, shall be deemed conclusively to constitute an abandonment of the mining claim by operation of law.

SEC. 6. Requirements to Qualify for a Patent. In order to establish the validity of a mining claim pursuant to this Act, a mining claimant shall comply with all requirements in law, regulations, or judicial and administrative decisions relating to qualifications for the issuance of a patent, including but not limited to, clear chain of title to the claim, location of the claim on lands open to mineral entry at the time of location and compliance with all other requirements for good faith location of a mining claim and in addition shall establish that:

(1) There has been a discovery of a valuable oil shale deposit, within the meaning of the mining laws. For the purposes of this subsection, the prospectively valuable rich beds of the Green River Formation are those yielding 15 gallons or more per ton of rock in beds not less than 1 foot thick, yielding 1,500 barrels of oil per acre. A discovery is shown to exist by either of the following:

(A) an exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim, or

(B) an exposure of a marlstone tongue of the Green River Formation, measuring not less than 3 gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the prospectively valuable rich beds. The rich bed must lie within the boundaries of the mining claim, but the inferred connection of the qualifying tongue of oil shale need not occur within the confines of the mining claim.

(2) There has been substantial compliance with the assessment work requirements of the mining laws, including the minimum annual expenditure of labor and means in an effort to develop a valuable oil shale deposit, without a lapse of two or more years duration unless such lapse was authorized by act of Congress, or there has been resumption of such assessment work after a lapse of two or more years but before initiation of a contest of the oil shale mining claim: Provided, that for any lapse of assessment work after the date of enactment of this Act the resumption of labor prior to the initiation of a contest shall not be a defense against a contest brought on this basis.

SEC. 7. Oil Shale Patents.

(a) Patents. A patent issued by the Secretary of the Interior after the date of enactment of this Act for a valid oil shale mining claim shall convey title only to the oil shale and associated minerals. Title to the surface and to all other minerals including, but not limited to, oil, gas, and coal shall remain in the United States. Section 120 of the Comprehensive Environmental Response Compensation and Liability Act, as amended, (42 U.S.C. 9620) shall not apply to this section.

(b) Surface Use. Oil shale patents issued pursuant to this Act shall also grant the right to use so much of the surface within the confines of the former claim as is reasonably necessary for the exploration, mining, and processing of the oil shale and associated minerals subject to the following conditions:

The right of surface use for exploration, mining and processing of oil shale is subject only to the filing with the Secretary of the Interior for public lands, or the Secretary of Agriculture for lands within the National Forest System reserved from the public domain, of a notice and submission of a bond in an amount sufficient to ensure adequate reclamation of the lands to be disturbed by any aspect of the proposed mining and processing operations. However, under no circumstances shall any liability under the Resource Conservation and Recovery Act, as amended, (42 U.S.C. 6901 et seq.) or the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (42 U.S.C. 9601 et seq.) resulting from such surface use accrue to the United States, either during or after exploration, mining, processing, and reclamation.

SEC. 9. Notice.

Within 60 days after the enactment of this Act the Secretary of the Interior shall send a written notification, setting out the provisions and requirements of this Act, to all owners identified in the documents required for recordation of mining claims under section 314 of the Federal Land Policy and Management Act of 1976.

SEC. 10. Exceptions.

The provisions of section 7 do not apply to those oil shale mining claims contained within patent applications numbered C-35080, C-36293, C-38579, C-39464, C-41836, and C-43354.

SEC. 11. Severability.

If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.

Senator **Wirth** [presiding]. Thank you very much, Mr. Cason. If I might just ask you one question, and then go to Senator Wallop, and then come back again.

As I understand it, the 1872 Mining Law says that, "On each claim located after the 10th day of May, 1872, and until a patent has been issued therefore, not less than $100 worth of labor shall be performed or improvements made during each year." Is that a correct statement of the law?

Mr. **Cason**. As far as I know, yes it is.

Senator **Wirth**. You did not mention the requirement in the 1872 law that $100 a year be invested in improvements. Is that not what the law says, that that has to be done?

Mr. **Cason**. That is what the 1872 Mining Law says.

Senator **Wirth**. Now, you did not mention that in your statement at all.

And one of the issues is that in all of this land that has been out here, that on none of it, or very, very little of it, is there any evidence that $100 a year has been invested. Am I incorrect in that?

Mr. **Cason**. I think it depends on the individual claim. There are some claims that probably have had the $100 per year.

Senator **Wirth**. But very few.

Mr. **Cason**. And there are many claims that have not.

Senator **Wirth**. There are hundreds of thousands of acres involved, but very little has had that $100 a year.

Mr. **Cason**. That is probably true.

Senator **Wirth**. So therefore, if that is the case, why do we then consider—the law says that not less than $100 worth of labor shall be performed on improvements made during each year.

That presumably is a requirement for getting a patent on that land. Is it not? And if they have not made that $100 a year investment, why are we giving them the patent on the land? The law says that, and has said that for more than 100 years.

Mr. **Cason**. I appreciate the question. I will give you our perception of the answer. It is an answer that comes from our Solicitor's office.

Over the course of that——

Senator **Wirth**. But this is an, the interpretation of the answer to this question is of great division, there is great division among your lawyers on the answer to this question. Is that not right?

Mr. **Cason**. Correct. That is why I started with the elephant story.

Senator **Wirth**. And this is the crux—I know, you say your solicitor's office. And one of the cruxes of the issue in giving away or selling that land for $2.50 an acre goes right to this issue. Is that not right?

Mr. **Cason**. Correct. That is a central issue——

Senator **Wirth**. And you did not mention that at all in your opening comments.

Mr. **Cason**. Well, I figured it would come up.

Senator **Wirth**. Which I find a bit concerning, because that is a great part of the debate. But go ahead.

Mr. **Cason**. I will try to answer that question. Over the last 120 years, since we had the 1872 Mining Law, a number of things have happened that have ended up changing the expectation on the part of the claimants about what they were required to do. As a start, what the law said in 1872, is what it says right now. However, the instructions that we have given the claimants over time have changed.

Those instructions began changing right after the passage of the Mineral Leasing Act in 1920. At that time we had several court suits in which the Department of the Interior attempted to challenge the validity of claims based upon failure to do assessment work. The Supreme Court ruled back then that we could not challenge claims for the lack of assessment work.

Between 1935 and 1960, the Department of the Interior patented claims without giving consideration to assessment work, and therefore we created an expectation on the part of all the claimants that assessment work was not important.

Additionally, one of the primary objectives of doing assessment work, as far as a claimant is concerned, is the fact that it allows one to protect their claim against rival locaters.

Senator WIRTH. If I can understand, between—you all are making the claim, or that statement has been made by the Department of Interior, that in challenging these the Department of Interior lost every suit, and the Supreme Court had ruled contrary to the challenges of the Department of Interior.

Is that right? I mean, I have heard that statement made by Interior, and it is not fully true. Is it?

Mr. CASON. Let us go back to the Hickel decision in 1970. I think that is where you are headed.

Senator WIRTH. Coming into that, when Ted Stevens was then Solicitor, our own Ted Stevens, our beloved——

Mr. CASON. Our beloved Ted Stevens.

Senator WIRTH. Senator from the great State of Alaska, was key to challenging a lot of those, saying that this was not the case. That in fact we ought to go back to the 1872 law. Is that not right?

Mr. CASON. I do not know about the Ted Stevens——

Senator WIRTH. And that the interpretations given by the court were not correct.

Mr. CASON. Certainly I will agree with the beloved Ted Stevens part.

Senator WIRTH. That we ought to abide by the 1872 law, as I understand it, saying that there ought to be $100 a year to have been invested in the improvement. If it has not been done, you do not get the patent on the land.

That is essentially an interpretation of that law over a period of time, which is what you are talking about. And that is again the crux of this issue. We can explain it up one side and down the other, but that is the fundamental problem.

Mr. CASON. Sure. As I have said, that issue has gone to court several times.

Senator WIRTH. I understand.

Mr. CASON. In the several times, we have had a couple decisions that said we could not use failure to do assessment work as a bar to patent.

Senator WIRTH. And you have had decisions that said you could. Right?

Mr. CASON. Not exactly. The *Hickel* decision in 1970, as I understand it, said that the Department does have authority to challenge for failure to substantially comply with assessment work.

However, the *Hickel* decision did not define what substantial compliance meant. It remanded the case back to the District Court, and after 15 years of proceedings the District Court finally decided that substantial compliance was $500 investment, period.

Senator WIRTH. This is the Judge Finesilver decision. Finesilver made this decision. Your attorneys in the regional office said, you ought to challenge that. Right?

And then their recommendation, is that not right, got overridden by the solicitor's office here? Is that not right?

Mr. CASON. The regional solicitor did advise a challenge to the *TOSCO* decision, Finesilver's decision.

Senator WIRTH. That is right.

Mr. CASON. It was not only for that——

Senator WIRTH. It got overridden here. You decided not to challenge that, and to sell the land at $2.50 an acre. Is that not right?

Mr. CASON. The end result of the process of taking a look at all of our cards is, yes, we decided to settle instead of challenge.

Senator WIRTH. You decided, so your regional solicitor recommended that you challenge the Finesilver decision, that you go back to the 1872 law.

Mr. CASON. Correct.

Senator WIRTH. Your solicitor in Washington decided not to do that, so you turned around and sold the land for $2.50 an acre. I mean, that is a layman's summary of what transpired. Is that not fair to say?

Mr. CASON. That is a political——

Senator WIRTH. What we are now trying to do is to figure out what we are going to do related to where we go from here on this.

Mr. CASON. Certainly that is a political summary of what transpired.

Senator WIRTH. Well, that is an accurate summary, is that not right? What is wrong with that summary?

Mr. CASON. The thing that is wrong with the summary is that it is a partial perception of all that occurred in the TOSCO settlement.

Our regional solicitor wrote an opinion, based upon the assumption that what we wanted to do was to challenge the Finesilver decision.

It was not a balanced piece saying, let us examine the advantages and disadvantages of challenging the Finesilver decision. It was a piece that says, my intent is to challenge, let me write a position paper that articulates all of the things wrong with it.

Senator WIRTH. If you wanted to protect the public and the public lands, you would challenge the Finesilver decision. That is another way of putting it. Is that not right?

Mr. CASON. Well, that is a way you could put it. But that is not how I would put it.

Senator WIRTH. Sure it is. You are darn right. I am interested in making sure that this sort of thing does not happen again, that we are in the business of selling off public lands for $2.50 an acre.

Just as I said in my opening comments, that just defies my sense of what common sense ought to be. It just does not make sense.

Mr. Cason. Well, certainly, I am touching a different part of the elephant.

I think probably one of the things I missed telling early on is, when I open my eyes to the elephant, I am holding the tail, and that is a dangerous place to be.

But within the Department of the Interior, we had a very different perception of where we were, in that we have a long history of litigation on these issues.

We have a history of Supreme Court decisions on discovery standard and assessment standard that began back in the 1920s, and extend all the way to 1980.

We have lower court decisions throughout that time that give us a broad range of judicial review of the key issues within the oil shale controversy.

When we took a look at the TOSCO situation, the Judge Finesilver decision, we looked at the regional solicitor's opinion, we looked at the advice that we received from the BLM people on the ground, we consulted our solicitor's office here and our solicitor.

We consulted the Department of Justice; we consulted the Secretary. A number of people were involved in the decisionmaking process, taking a look at all the things we could win and lose with appeal.

Judge Finesilver, in his decision, suggested to the Department that enough was enough, why do you not settle? We have gone through all of these issues before, why do you not bring this thing to settlement?

The approach we used for the Finesilver decision was to say, we have certain things to win and lose on appeal, we have certain things to win and lose in a settlement process. It was not until the very end of that time period before we had to file an appeal that we finally made the decision, after weighing all the factors.

And from the factors that we weighed and the conclusions we drew we determined that the public interest would be better served by a settlement wherein the Federal government got back the leasables—the oil, gas, coal—and certain rights to the surface instead of another appeal that did not appear prospectively to be one that we could win in its entirety.

As I understand it, we would have had to win all of the issues in their entirety to get to where we wanted to be. In that case, we would end up in a situation where we would lose the entire fee estate—all rights to the surface, all rights to the subsurface, including oil, gas, and coal.

So we made a value judgment that the public would be better served by giving away just the oil shale and limited rights to the surface, instead of the entire fee estate on what appeared to be another fruitless appeal.

Certainly I cannot argue that the Federal Government does not have the taxing authority to tax the taxpayer's pocket and an unlimited litigation fund. We do. We could litigate this forever and have been. But 70 years is enough on these key issues.

Senator WIRTH. Your solicitor on September 12, 1985 felt directly to the contrary. I appreciate your continued defense of what I think is an absolutely unjustifiable set of decisions.

But what we have got to do now is to try to figure out how to legislatively go about seeing if we can solve this.

Mr. CASON. Agreed.

Senator WIRTH. And that is what we want to do for the future. I agree with you, let us get this 70-year history out from behind us.

Mr. CASON. I would love to.

Senator WIRTH. Let us see if we can sort it out. It would be very nice to be able to do so.

And it is our hope that we can work with you in whatever way is necessary and appropriate, if you have problems with various parts of the legislation, then we ought to maybe go back and look at those.

But let us see if we can get this thing done once and for all and, from my perspective get the "for sale" sign off of the oil shale land. From your perspective, see if we can save face for all the attorneys who made this ridiculous decision. Senator Wallop?

Senator WALLOP. Mr. Cason, I want to compliment you on your testimony.

And I would say again to my friend from Colorado that there are a number of people in your state, in government in your state, particularly in the counties affected, who disagree with that. They feel that their interests are better served by the settlement that was arrived at.

And I think it is important to restate that in this process of settlement, neither side won all of the things that could have taken place in an ultimate court decision. And the government did end up with the interest that it stood to lose.

You can speculate, and I can speculate, as to whether they would have lost them. But a judgment was made that they stood to lose them, and that they protected that element of the public's right by entering into the settlement.

But I do not think it is really fair to characterize this as either venal or subversive or unstudied. You can disagree with the conclusion that they reached. But in point of fact, they did set out and in their mind, at least, did protect some of the public's fee interest.

Senator WIRTH. If the Senator might yield for a minute, I did not use the words venal, subversive, or unstudied. I think that what you did do, you put your finger on the issue and that is judgment. Right?

And I think that it was lousy judgment. But the issue is the judgment involved.

Senator WALLOP. Perhaps. It is certainly fair to say you did not use those words. It is not entirely accurate to say that there was not a studied implication around the words and the quotations of the solicitor and other things that you used, and certainly the Senator from Montana.

But be that as it may, there are some questions which I think do bear asking, and one of them goes back to the fundamental, and that is whether or not an unpatented mining claim is private property protected by the fifth amendment of the Constitution from taking, without just compensation.

Mr. CASON. From our perception, it certainly is. If you take a look at a court case, a Supreme Court decision, back contemporaneous with the passage of the Mineral Leasing Act, and just post that period where we were beginning to deal with the issue again, in *Wilbur* v. *Krushnic,* a 1930 Supreme Court decision, they looked at whether an unpatented mining claim is a private property right and decided that an unpatented mining claim is a property in the full sense of that term.

The owner is not required to purchase the claim or secure a patent from the United States. But so long as he complies with the provisions of the Mining Law, his possessary right for all practical purposes is ownership. It is as good as if it were secured by a patent.

This includes their opportunity to extract all of the minerals, to transfer it, to mortgage it, inherit it; it is a property right in the very real sense.

Senator WALLOP. It is the quirkish government that seeks to protect the rights of its citizens, that it has bestowed upon them.

Mr. CASON. I have noticed that in this process.

Senator WALLOP. How would the Department of Interior's draft bill escape the same takings challenge if it would terminate possessary rights of oil shale claimants that did not apply for patent within three years?

Mr. CASON. Well, I think the first and most important difference between the two approaches—the one that we have been working on in the Department of the Interior, and the one that is emanating from the Hill—is that we have tried to go to the claimants and work with them to find a reasonable solution to the problem. In so doing, what we have tried to do is protect their opportunity to pursue a patent.

The first noticeable difference between our two approaches is the legislation that started on the Hill picked a date, February of 1987 if I remember right, which says, as of this date, if you have not read my mind in advance, you lose your opportunity to get a patent.

We do not think that is fair. We think a way to address that problem is to give everybody fair notice that we are going to remove prospectively the opportunity to patent these oil shale claims and give everybody an opportunity to put up or shut up. That opportunity was never given.

I think secondly we have taken a look at what we perceive to be the problems we have on the Hill or what problems the claimants have on the Hill, and there seems to be a lot of concern about the surface use of, or the surface disposal over, these claims.

We have tried to react to it by saying, claimant, what we will do is we will cut a deal with you in a legislative sense to try and bring certainty to the issue. You can obtain patent to the oil shale resource if you meet these tests over here, and we have defined in our approach what the discovery standard is, and what the assessment standard is consistent with the resumption principle.

We have said, if you can meet these standards, you can get the oil shale resource, and we will patent that. You can protect it, but in cutting this deal to settle this problem we are going to reserve to the United States the surface estate.

Now, there are going to be some folks who do not like that, and potentially even that much, this compromise deal could constitute a taking. That is something for a judiciary to decide.

The principal difference is that in our approach the claimants at least have the opportunity to seek patent of the oil shale resource they have been pursuing, and if they meet these tests they have an opportunity to get the patent to it, which is not even possible under the Senate approach. I think those are the principal differences.

Senator WALLOP. One of the concerns I have with the Senate approach is that it creates three classes of claimants. Does it not?

Mr. CASON. It does. It has a class of claimants who, if they had filed before February of 1987 had one set of exemptions, if they filed between February of 1987 and when the bill was passed they had another set of exemptions and if they do not file at all they have theoretically another set of rights.

I question, though, Senator, whether these distinctions are ones that we are creating, or whether they are ones real in law, in that, under normal mining law, if you had a discovery as of 1920, you had a right as of 1920. I wonder whether we should be drawing a distinction on that right based upon when a claimant applied for patent.

Senator WALLOP. Well, the Mineral Leasing Act provides for leasing of Federal oil resources and also permits the conversion of those oil shale claims to leases.

Why, if this is such a marvelous deal, does there appear to be so little interest, or no interest, in Federal oil shale leasing?

Mr. CASON. Well, as you know, the MLA offered the opportunity to convert to a lease at any time over the last 66 or 67 years. To my knowledge, no one has converted the claim from an oil shale claim to an oil shale lease under that authority.

The authority under S. 2089 gives basically the same opportunity. It is one that has been refused for almost 70 years. I think the principal reason that people would not do that is they get a much smaller set of rights under a lease than they do under the possessary rights of the mining claim.

As I said, one can, with a mining claim, extract all of the minerals without paying the Federal Government any royalty. That is not the same situation under a lease. The mining claim has considerably fewer government restrictions on how one would use it than a lease does.

Leases come with a tremendous number of government terms and conditions, are subject to all applicable laws, and are subject to regulation. While mining claims also have some of that, they do not have them to the same extent because they are possessary rights instead of rights granted under a lease.

Senator WALLOP. It strikes me that the Congress is a bit quirkish in huffing and puffing over this thing.

We have had 116 years to change some of the provisions of that 1872 law that we now find offensive. And to change them only with regard to the relationship that one particular set of potential claimants has to the law seems, from this perspective, particularly unworthy of us.

I mean, if the law is wrong, then for heaven's sakes change it in its entirety, but do not aim at one particular set of claimants and assume that that is fair play. Because there are obviously other kinds of events that could take place in here. That is one of my principal objections to this.

And I would not be surprised to see that that was not an objection that the Supreme Court might find, just as it found that particularly venal little thing that Congress did over the continuing resolution with regards to Rupert Murdoch.

I do not think you can set out one narrow view of claimant, and go pow, and shoot him, and be fair under the Constitution. And yet I think that is precisely what this bill is doing.

Mr. CASON. Well, certainly this bill would treat oil shale claimants far differently than all other mining claimants.

I think another point that is tangential to that is if the objective of the bill is somehow to eradicate the claims under an as yet undefined public purpose of adding this resource back to the Federal estate, I think we ought to look at that fairly and say, let us do an assessment of what rights these people have today purchase the claims for whatever value they have, and add it to the Federal estate.

But it is not fair to approach the issue, if that is the objective, just by merely confiscating the claims and ignoring the rights that have been developed over time.

Senator WALLOP. Then I would assume that you have a different view from those critics who charge that the government is merely selling for $2.50 an acre the land that it possesses with oil shale claims under it.

Mr. CASON. Well, certainly we do have a far different point of view from Senator Melcher and Senator Wirth.

The $2.50 is often, in my mind, mischaracterized. We are not in the process of selling the land for $2.50 and have never done that under the Mining Law. Under the Mining Law, the $2.50 is an administrative fee.

Congress cut the deal in 1872 that said, if you meet these tests, you have a discovery; you made it on land open to entry; you did the $500 assessment work; you are protected against rival locaters.

If you meet this test, there is a duty on the part of the Federal Government to issue a patent upon application, and the administrative fee associated with that is $2.50. It is not selling it; it has absolutely nothing to do with fair market value; it was never intended to relate to fair market value of the land.

So there is certainly a considerable difference of perception and opinion on that issue.

Senator WALLOP. Thank you, Mr. Chairman.

Senator WIRTH. Senator Murkowski.

Senator MURKOWSKI. I have no questions.

Senator WIRTH. Thank you very much for being with us this morning.

I think that there are some areas where, as I understand your testimony, you have some particular problems with the legislation, and it seems to me there is room there for us perhaps to get together and see if we can work this out.

I do not want to leave, if I might, Senator Wallop, not for the purpose of debate here about the fifth amendment.

And I think, if I might just read into the record, this is not the first time that Congress has acted to cut off patent applications.

When Congress established the Sawtooth National Recreation Area in Idaho, Congress terminated the right of mining claimants to acquire patents. Claimholders sued, arguing that the legislation amounted to a taking.

The court quickly disposed of that argument, saying, "The case before us thus ultimately reduces to the question whether a plaintiff, the claimholder, has suffered an unconstitutional divestment solely by virtue of the fact that he no longer has the option to apply for patents under his claims.

'Common sense dictates a negative response. At best, plaintiff has suffered a denial of the opportunity to obtain greater property than that which he owned upon the effective date of the Sawtooth Act. This cannot be fairly be deemed the divestment of a property interest, save by the most overt bootstrapping.'

Following that, the same kind of provision was included in legislation establishing the Steese—I hope I pronounced that properly—National Conservation Area, the Oregon Cascades Recreation Area, and the Wilderness Act of 1964.

There is room in here for——

Senator WALLOP. Could I ask Mr. Cason if the Department views this in the same perspective?

Mr. CASON. Well, no we do not, Senator. We are aware of the legislation on the Sawtooth, and it was involved in the Freese case.

And we believe that the production requirement in S. 2089 raises the bill to a level of taking because of the very strong likelihood that shale oil in significant marketable amounts will not be obtainable from a claim within 10 years of enactment. Thus it would be deemed abandoned.

This is despite the fact that the oil shale claimants would be required to perform 10 times the annual assessment work that other mining claimants are obliged to do. As the Supreme Court noted in Andrus v. Shell, the prospective value of the rich beds of oil shale is sufficient for patenting under the mining laws.

But S. 2089 would limit to 10 years the period in which this prospective value would become actual value, thereby substantially reducing the only market value of unpatented oil shale mining claim, that mining claims have.

The elimination of the market value associated with the prospect of future utility we believe would be an un-constitutional taking that is at issue here. The Sawtooth was not the same issue.

In the Sawtooth, they left the claimants with the full right to continue mining, and the only thing that was disturbed in the Freese case is the ability to obtain a patent. But these claimants had all other possessary rights and were able to continue ad infinitum. S. 2089 does not do that.

Second, we have some concern within the Department of the Interior and our Solicitor's office that the Freese case as a lower court decision has some problems with it, or at least I understand it to be a lower court. Maybe you do not. But we believe that the Freese case has some problems with it, and we do not think it is sacrosanct.

Senator **Wirth**. Well, now that we have both read our legal opinions into the record, and you thought that the Freese case was a problematic lower court opinion, and I happen to think that the Finesilver case is a problematic lower court opinion, that is what brings us here today in terms of trying to work this out in a legislative fashion.

I appreciate, Mr. Cason, your patience in all of this. You have been up here a number of times. You are a very good and engaging witness. I appreciate your patience with all of this.

Mr. **Cason**. It has been fun.

Senator **Wirth**. I would not describe it as being fun. But it is important, and I hope that we can work this out and get it behind us.

Mr. **Cason**. Senator, the only concern that I have in trying to work the thing out is that it is going to be very difficult for your staff and our staffs to try to come to an accommodation of minds, if we cannot first agree upon the objectives we are going to try to serve.

I think the objective behind S. 2089 is far different than what the Department is trying to pursue in terms of a solution to the problem. I think that is the first matter we need to discuss, and from there I think both of our staffs will be in a position to arrive at an amicable solution.

So thank you for the opportunity to testify.

Senator **Murkowski**. I am just curious about the comment of Mr. Cason with regard to the objectives.

Until the objectives are understood and addressed, assuming the objectives are in opposition, then where are you?

Mr. **Cason**. Well, that is why I stated, I think it would be very difficult to come to accommodation until we can agree on the objective.

Senator **Murkowski**. Well, assuming you cannot agree, then I assume it is a bit of an adversarial——

Mr. **Cason**. It is problematic. It is adversarial.

Senator **Murkowski**. My attempt to question you, as I assume that that could very well be the alternative that would be the situation, when you have exercised this communication, and assuming your objectives are entirely different, then you do not expect to be able to compromise a position. Is that correct?

Mr. **Cason**. I think that is correct. I think in the long term if we cannot agree upon the objectives, unfortunately I do not hold all the whole cards, that you folks have the opportunity to create and decide what legislation you are going to pursue.

We are in a reactionary position within the Administration, that we just say, yes we like it, no we do not, but we do not really have any control of what it says. We would be happy to provide our input on what we think is equitable, but it would be far easier if we could agree on the objectives.

Senator **Murkowski**. Thank you, Mr. Chairman.

Mr. **Cason**. Thank you.

Senator **Wirth**. Thank you very much, Mr. Cason. We are presumably to have a vote on the floor at 11. Why do we not just proceed. Who knows what might be transpiring over there between now and the announced hour of the vote, which was seven minutes ago?

Our second panel this morning includes three distinguished lawyers on this subject, Ms. Kathleen Zimmerman, who is counsel to the Public Lands Division of the National Wildlife Federation in Washington—if they could all join us at the table—Professor Patrick McGinley at West Virginia University College of Law in Morgantown, West Virginia; and Professor John D. Leshy, Arizona State University College of Law in Tempe, Arizona.

It is my understanding from this witness list put together by the subcommittee staff, that Mr. Leshy is a nationally recognized expert on mining law.

And Mr. McGinley is an expert on takings law and has successfully argued several cases before the Supreme Court in the last several years, each involving discussions of government action constituting a taking.

And Ms. Zimmerman has been actively involved in a variety of oil shale issues. So we have experts from three different perspectives with us today.

What I would like to do, if we might, is to include your statements in full in the record, and then go on from there to questions from the Committee. And I think we are going to be probably coming and going, given the state of the floor. But one never knows exactly what may be transpiring.

Why do we not start with you. I do not know what is the easiest order. Maybe we could go to you, Mr. McGinley, then to Mr. Leshy, and then to Ms. Zimmerman, and we will include your statements in full in the record. Thank you all very much for being with us.

STATEMENT OF PATRICK C. McGINLEY, PROFESSOR OF LAW, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, MORGANTOWN, WV

Mr. McGINLEY. Thank you, Senator Wirth, and the Committee. I appreciate having the opportunity to testify with regard to S. 2089.

I might say at the outset that I did not appreciate fully the extent of the public interest in this controversy. I have been on sabbatical this year and been out of the country quite a bit of the time.

When I was asked to testify I made some inquiries and found that this controversy has hit the pages of the National Enquirer. So clearly there is some great popular interest in the outcome.

Senator WIRTH. Mr. McGinley, just on that front, a statement was made about various county commissioners opposing the legislation. They may, we have not heard from them on that front. They may.

There are, as you can imagine, a broad variety of groups that are overwhelmingly in favor of the legislation, and this has, you know, piqued the interest of an awful lot of people across the country, I think, their sense of fairness.

But a lot of people who are in the ranching business, a lot of people who are in the wildlife business, a lot of people who hunt and fish and so on on the Western Slope in Colorado. So it is an issue that has raised a lot of concern.

Mr. McGINLEY. It is clear, just among those who I have discussed it with, who are nonlawyers, they initially suspect that my testimony would be on some mundane topic, relatively dry. But when I explain the issues involved to a person, they find it to be fascinating. And also obviously an important issue.

My remarks today will address the concerns that have been raised with regard to possible constitutional problems attendant to S. 2089.

Specifically, it has been suggested that if enacted in its present form the bill may be an unconstitutional taking of private property of the holders of oil shale claims who have a right to patent such claims.

The concern is that section 2 of the proposed bill, which prohibits the issuance of patents for oil shale claims after February 5, 1987, takes private property of the claimholder in contravention of the fifth amendment to the Constitution of the United States.

In a recent case, the Supreme Court remarked that, and I quote, "The attempt to determine when regulation goes too far that it becomes a taking has been called the lawyer's equivalent to the physicist's hunt for the quark."

And having been a law instructor for 13 years, I can assure you that in the classroom, in the courts, and among attorneys and legislators who discuss the parameters of Constitutional taking analysis, there is indeed great controversy, as Mr. Cason suggested. There is no doubt about that.

However, I would submit to the Committee that some recent cases have begun to clarify the parameters of taking law. For example, the decision last term in the *Keystone Bituminous Coal Association* v. *DiBenedictis* case is instructive.

I have taught environmental law for some time now. I also practiced as an attorney for a state regulatory agency in Pennsylvania with regard to environmental issues. And I found that it seemed almost in every case that regulations of land use and business activities would be challenged by those who are regulated, and the claims were made that there was a taking of private property.

For example, the regulation in the Appalachians of Acid Mine drainage. It was alleged that laws which prohibited and regulated discharge of Acid Mine drainage was a taking.

Well, the *Keystone* case, which involved regulation of coal mine subsidence, I think has laid to rest a considerable amount of the controversy, at least with regard to one element of taking analysis.

In the *Keystone* case, the court held, among other things, that the special status of this type of regulation, that is a regulation that deals with private activities, private uses of property that amount of nuisances, can be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance, or to otherwise harm others, the state has not taken anything when it asserts its power to enjoin the nuisance-like activity.

So I would submit to the subcommittee that a large element of controversy, to which the Supreme Court and commentators have addressed themselves, has been resolved by the Supreme Court in the *Keystone* case where they found that this area of controversy is answered by a simple theory. That the resolution of that part of the takings controversy has been simple.

The extent to which *Keystone* applies here is somewhat more problematic, but what I would suggest is that the controversy concerning the constitutionality of S. 2089 is not as difficult to resolve as one might think.

A careful analysis of the bill, I believe, the legislative objectives which support it and the cases which serve as guides for determining the scope of legislative power vis-a-vis private property leads, I would submit, to the inescapable conclusion that the bill rests on firm Constitutional ground.

To determine whether the bill can withstand constitutional scrutiny, one should first be acquainted with the fifth amendment taking clause. It says, nor shall private property be taken for a public use without just compensation.

Contrary to the mistaken impression of many, this clause does not prohibit legislative action which diminishes or even in some instances confiscates private property. And the Supreme Court has stated that very recently in the *First English Lutheran Church* case.

They said there, as its language indicates and as the Court has frequently noted, this provision does not prohibit the taking of private property.

Moreover, it must be understood that every exercise of legislative power which diminishes, or even destroys the value of private property, is not a taking.

On the contrary——

Senator WALLOP. Excuse me, but what does it?

Mr. MCGINLEY. Pardon me?

Senator WALLOP. If it does not prohibit the taking of private property, why does it mention it?

Mr. MCGINLEY. First of all, Senator Wallop, what the fifth amendment says, nor shall private property be taken for a public use without just compensation, means that if private property is taken for a public use that is perfectly permissible upon payment of just compensation.

Senator WALLOP. Okay. But I guess that is not precisely what I heard you to say. The implication of what your words were to me, at least, was that it can do whatever it likes, without compensation.

Mr. MCGINLEY. That is why I referred, as Justice Black used to do, to the words of the Constitution themselves.

I think that is an area of some confusion. On the other hand, there are many who believe that a legislative body cannot pass legislation which confiscates private property.

For example, no one would suggest that the police cannot confiscate contraband drugs, even though they may have great value. It is clear that that is an exercise of the legislative regulatory power. So there are many misconceptions in that regard.

Senator WALLOP. Surely you are not comparing an oil shale claim with an illegal drug. There should be some distinction.

Mr. MCGINLEY. Well, I think your inquiry points up the difficulty many people have in trying to understand the parameters of constitutional taking law.

Senator WALLOP. My question went to the fact that as I understood your testimony, at least, you did not mention the just compensation side of it.

You just said that, what I heard you say was that we can take whatever we wish, and you made no mention of compensation.

Mr. **McGinley**. No, I think I read that provision of the fifth amendment. If I did not read it in full I certainly——

Senator **Wallop**. You read it. But I am talking about your words as interpreting it.

Mr. **McGinley**. Certainly not. As I was saying, the legislative bodies possess broad powers to regulate, even to the point of confiscation.

In the *Keystone* case last term, Congress emphasized that under our system of government one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property.

And in analyzing the bill before the Senate, it is important to understand that there is no constitutional bias that favors the rights of private property over the right of Congress to enact legislation that is intended to advance public interests.

The Constitution does not create a hierarchy of values which places private property in a position superior to that of other important public interests. It is an interest that is certainly extremely important, but it is an interest that must be dealt with along with important public interests that Congress also has responsibility to protect.

As I mentioned above, the Supreme Court has not established a set formula to aid judges and lawyers and legislatures in determining when a governmental action constitutes a taking.

And I would agree with Mr. Cason with regard to the analysis that the Supreme Court has adopted in dealing with taking cases. That is essentially an ad hoc factual inquiry, looking at the economic impact of the regulation, the impact on investment-backed expectations of those who claim to have been harmed, and the character of the governmental action. And I believe that when the bill is subjected to such an ad hoc inquiry, its Constitutional validity is clear.

More specifically, the central feature of the suggestion in section 2 of the bill would affect an unconstitutional taking is that the section's impact on the ability of holders of oil shale claims under the 1872 Mining Law to patent the claim, and thereby assume fee simple ownership of public land, that is the central feature as I understand it of the constitutional concern, although there are some others with regard to the election provision. And section 2 does flatly prohibit the issuance of a patent to those who apply after February 5, 1987.

The theory that the extinguishment of the ability of an oil shale claimholder to patent such lands, that this would be a taking, can only have vitality if the ability to patent rises to the level of a property interest that comes within the protection of the fifth amendment's taking clause.

Does this provision of the 1872 Mining Law, which allows a mine patent claimholder to patent a claim, vest in the claimholder a property right that cannot be taken absent payment of just compensation? If no such property right is vested in the oil shale claimholder, the Constitutional inquiry is at an end.

An examination of the oil shale claimant's interest in patenting the claimed land reveals that, in my view it falls far short of the type of private property right that has heretofore been protected under the taking clause of the fifth amendment.

The Supreme Court's recent decision in the *United States* v. *Locke* is instructive. *Locke* involved a claim that a taking had occurred where a taking was alleged as a result of the annual filing requirements of FLPMA, which extinguishes mining claims for failure to meet the FLPMA procedural requirements.

The law court was required to evaluate the nature of the property interest, which relates to unpatented mining claims. And there the court said, although owners of unpatented mining claims hold fully recognized possessary interests in their claims, we have recognized that these interests are a unique form of property.

The United States as owner of the underlying fee title to the public domain maintains broad powers of the terms and conditions which the public lands can be used, leased, and acquired.

Senator **Melcher** [presiding]. The Committee will, by necessity, stand in recess until after the vote. They are already more than halfway through the time period for the allotted vote, and it will be necessary for all of us to be on the floor until that is accomplished. That will be approximately 10 or 15 minutes. Until then, the Committee is in recess.

[Recess.]

Senator **Melcher**. The subcommittee will proceed. I do not think we are going to have another vote very quickly, but we will probably have to ask you to summarize as briefly as possible in case that does occur. Please proceed.

Mr. **McGinley**. Thank you, Senator Melcher. When the subcommittee adjourned, I was discussing the *United States* v. *Locke* case.

In that case, the court described the limitations of a company acquisition of unpatented mining claims. Of particular import is the court's observation that claimants must make their mineral interest, take their mineral interest with the knowledge that government retains substantial regulatory power over those interests.

Thus holders of unpatented mineral claims, including oil shale claimants, acquire their interest in the minerals on public land knowing that government has broad powers to regulate their use of such land, and this power extends to the extinguishment of all the claimant's interest for mere failure to make simple procedural filings, as held in the *Locke* case.

Moreover, in *Locke*, the court pinpointed with precision the exact nature of the unpatented mineral claimholder's investment-backed expectations, as that term is used in the Supreme Court's taking jurisdiction.

The law court said, the property right here is the right to a flow of income from production of the claim. That, I would submit, is what this controversy is about. That is what the Mining Law is about.

When people acquired claims with regard to oil shale, what they were interested in is a flow of income from production of the claim. The Supreme Court has recognized that.

And the motivating force is not to acquire fee simple land for other purposes. The interest of the claimants was, and the Supreme Court has recognized, is to produce oil from oil shale lands. That is, the core property interest of the unpatented mineral claimholder, it was obvious to the court, it is plain to any objective observer.

To the extent that the oil shale claimholder possesses a property right is the right to mine and remove oil shale for profit. Indeed, the law under which the claims were made is the Mining Law of 1872, not the real estate speculation law of 1872.

The fact that Congress appended to the Mining Law of 1872 the option to secure a patent on the land where oil shale was discovered and located does not add to the claimholder's property right.

Indeed, I would submit that the Committee ought to look at this interest in patenting land as an option, an option that has not been taken up by the oil shale claimants. They have had over 70 years to exercise that option.

And general principles of law recognize when an option does not set a cutoff date, a reasonable time is, after a reasonable time that option might be withdrawn. And I would suggest that indeed that is what S. 2089 does. It simply, after a more than reasonable time, takes back that offer of an option.

The oil shale claimholder who chooses not to patent the claimed land nevertheless may go forward and extract oil shales to exhaustion. However, the claimholders have no vested property right in patenting the land upon which their claim is located.

To vest their interest in such land, the claimant had only to follow procedures for patenting the land including the payment of the $2.50 an acre fee. And as we heard Mr. Cason say, they are not buying the land, they are really being given the land. They have the option to take the land, they are given to it, and they only have to pay a procedural fee for filing.

As the Supreme Court noted in Locke, the claimholders could have fully protected their interest against the effect of the statute by taking the minimal step, and that is the words of the Supreme Court, the minimal step of patenting the claims. And they have not done that.

Consistent with the view that the option to patent a mining claim is an insubstantial property right that is not vested is the decision of the Court of Appeals in *Alaska Miners* v. *Andrus.* And I will not go into that in detail. That is in my written testimony.

The thrust of the *Alaska Miners* opinion is that the government may withdraw or convey title to land that is otherwise subject to valid unpatented claims.

Finally, in summing up my remarks, with regard to taking considerations, courts have looked at investment-backed expectations and diminution of value as benchmarks for determining where there has been a taking.

And the insubstantial nature of the oil shale claimants option to patent their claims is underscored by the fact that the outstanding oil shale claims have never seen the extraction of oil shale, even though the claims are more than 60 years old.

Surely Congress did not intend to grant a vested right to purchase a fee simple interest in public lands to shale oil claimants who have failed to mine the land claim for that purpose for almost three-quarters of a century.

Obviously, what Congress contemplated was the extraction of oil shale from located claims, not the conveyance of public lands decades after claim location to claimants who have never extracted oil shale, and who would not be required to mine if they are successful in securing a patent.

As the Supreme Court has looked to the reasonable investment-backed expectations of those asserting a taking, such an analysis would be appropriate here. And as noted above, the investment-backed expectations of the shale oil claimant is the expectation of mining the mineral at a profit.

S. 2089 does not extinguish oil shale claimants' expectations of profit from mining. The right to mine valid unpatented shale oil claims is fully preserved by the bill, which gives claimholders the option to convert the claims to a lease or continue to hold the claims subject to regulatory requirements. The reasonable investment-backed expectations of the shale oil claimants are not affected by the bill.

Another consideration the Supreme Court has examined in taking cases is the extent to which an alleged taking has impacted on the property interests involved. In viewing this impact, the Court has refused to separate the property into discreet segments when the alleged diminution of value of the property is analyzed.

And I would direct the Committee's attention to the *Penn Central* case and the recently-decided *Keystone Bituminous Coal Operators* case. In both of those cases, some elements of the rights to use and exploit property were impacted upon by regulation.

And the Court said that, if there remained a property interest from which the property owner could receive some reasonable profits, there was no taking. And that is precisely the case with regard to S. 2089.

Presumably, what the oil shale claimant's interest is is to mine oil shale and make a profit. And these bills do not affect that core interest. That is the overriding interest with regard to their possession of these particular tracts of land.

So, in light of that, there has been the interest in patenting the claim, or in holding on to the property in perpetuity, is insubstantial. It does not rise, I would submit, to the level of a constitutionally protected property interest.

And what is a constitutionally protected property interest is the right to extract oil shale. If they are going to do that, that interest is protected, subject to reasonable regulations. And that is what, I would submit, the proposed bill is about.

And in closing I would suggest also one might consider, should the courts determine that a bill like this would be a taking, what would be just compensation? And I would underscore the words "just compensation."

Would it be the $100 an acre, or excuse me, the $100 a year assessment? Or $500? Would it be $2.50 an acre? Would it be $100 an acre, as current appraisals might suggest? Or $40,000 an acre, as apparently has been paid for some oil shale claims?

I would submit that in considering this, what would be just, it clearly would not be any more than $2.50 an acre, and I would submit it would be considerably less.

In fact, I find it difficult to believe that a court in looking at the situation here, where the unpatented oil claimholders could have patented their lands for 70 years, and the fact that they did not do that, and they could have exploited that land, I find it difficult to believe that the courts would find any compensation to be just.

I appreciate the opportunity to present this testimony.

[The prepared statement of Mr. McGinley follows:]

TESTIMONY OF PATRICK C. MCGINLEY

Professor of Law
West Virginia University College of Law
Morgantown, West Virginia

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

OF THE

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

On S. 2089- -to Amend Section 37 of the
Mineral Lands Leasing Act of 1920
Relating to Oil Shale Claims

22 April 1988

I. INTRODUCTION

Thank you, Mr. Chairman, for inviting me to testify with regard to S.2089.

For the last 13 years I have been a member of the faculty of the College of Law at West Virginia University. The focus of my teaching, research and writing has been in the field of natural resource and constitutional law. I have taught courses in the areas of land use, administrative, natural resource, coal and constitutional law. Prior to joining the West Virginia University law faculty, I served as a Special Assistant Attorney General assigned to the Pennsylvania Department of Environmental Resources.

My remarks today will address concerns that have been raised with regard to possible constitutional problems attendant S.2089. Specifically, it has been suggested that if enacted in its present form, the bill may effect an unconstitutional "taking" of property of the holders of shale oil claims who may have a right to patent such claims. The concern is that section 2 of the bill, which prohibits the issuance of patents for oil shale claims after February 5, 1987,[1] "takes" private property of the claim holder in contravention of the Fifth Amendment to the Constitution of the United States.

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[1] S.2089 would allow some claims to proceed to patent after the February 5, 1987, cutoff, if upon that date "... a patent application had been filed and all the requirements for a patent had been fully complied with by such date."

In a recent case, the Supreme Court remarked that "...the attempt to determine when regulation goes too far that it becomes...a 'taking'has been called the 'lawyers equivalent to the physicist's hunt for the quark."[2] In another case the court expressed similar exasperation with "taking" jurisprudence: "...this court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government...."[3]

Having recognized the confusion that often accompanies discussions of "taking" law, I submit that this confusion has often resulted in inappropriate attacks on legitimate exercises of legislative power. I believe that objections to S.2089 on "taking" grounds fit this discription. A careful analysis of the bill, the legislative objectives which support it and the cases which serve as guides for determining the scope of legislative power vis a vis private property interests lead to the inescapable conclusion that S.2089 rests on firm constitutional ground.[4]

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[2] Williamson Co. Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. 3108, 3124 (1985).

[3] Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978).

[4] Appended to my written testimony a recent article in which I have attempted to sort out this confusion and clarify the scope of legislative power to affect private property interests.

II. "TAKING" LAW GENERALLY

To determine whether S.2089 can withstand constitutional scrutiny, one must first be acquainted with the literal language of the "takings" clause of the Fifth Amendment:

> ...nor shall private property be taken for a public use without just compensation. U.S. Constitution, amend. V.

Contrary to the mistaken impression of many, this clause does not prohibit legislative action that diminishes or even confiscates private property. As the Supreme Court stated very recently:

> As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights _per se_, but rather to secure _compensation_ in the event of otherwise proper interference amounting to a taking." _First English Evan. Luth. Church v. Los Angeles County,_ 107 U.S. 2378 (1987).

Moreover, it must be understood that every exercise of legislative power which diminishes, or even destroys the value of private property is not a taking. On the contrary, Congress possesses broad "police" powers to protect the public welfare, health and safety. It has long been recognized by the Supreme Court that:

> Under these [police] powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the common

> good.... [W]e think it has never been successfully contended that such legislation came within any of the
>
> constitutional prohibitions against interference with private property. Munn v. Illinois, 123 U.S. 623 (1887) See also, Keystone Bituminous Coal Assn. v. DeBenedictis, ___ U.S.___(1987).

Thus, Congress has sweeping power to enact legislation that impacts on citizens' rights to own and use private property. Just last term, the Court emphasized that:

> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. Keystone Bituminous Coal Assn., supra.

In analyzing S.2089 it is important to understand that there is no constitutional bias that favors the rights of private property over the right of Congress to enact legislation intended to advance the public welfare. The constitution does not create a hierarchy of values which places private property in a position superior to that of other important public interests. While private property rights are afforded protection by the constitution, private property is held subject to constitutionally recognized public rights and interests.

The constitutionality of S.2089 must be determined in light of these well established propositions.

III. S.2089 DOES NOT AFFECT A TAKING OF PRIVATE PROPERTY

As mentioned above, the Supreme Court has not established a "set formula" to aid judges, lawyers and legislators in determining precisely when a governmental action constitutes a taking. The approach to taking analysis adopted by the Court requires:

> ...essentially *ad hoc* factual inquires that have identified several factors - such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action - that have particular significance. *Hodel v. Irving,* 107 S.Ct. 2076 (1987). See also *Kaiser Aetna v. United States*, 444 U.S. 164, at 175 (1979).

When S.2089 is subjected to such an *ad hoc* factual inquiry, its constitutional validity is clear.

A. Nature of the property interest affected by S.2089

The central feature of the suggestion that section 2 of S.2089 would affect an unconstitutional "taking" is that section's impact on the ability of holders of oil shale claims under the 1872 Mining Law to patent the claim and thereby assume fee simple ownership of public land. Section 2 flatly prohibits the issuance of a patent in connection with an oil shale claim, unless the holder of the claim filed a patent application by February 5, 1987. The theory that the extinguishment of the ability of an oil shale claim holder to patent such lands would be a "taking" can only have vitality if the ability to patent such rises to the level of a property interest that comes within the purview of the protection of the Fifth Amendment. Does the provision of the 1872 mining law, which allows a mining claim holder to patent a claim, vest in the claim holder a property right that cannot be "taken" absent payment of just compensation? If no such property right is vested in the oil shale claim holder, the constitutional inquiry must be resolved in favor of S.2089.

An examination of the oil shale claimant's interest in patenting the claimed land reveals that it falls far short of the type of private property right heretofore protected by the "taking" clause of the Fifth Amendment. The Supreme Court's recent decision in United States v. Locke is instructive. Locke involved a claim that a taking had occurred where a "taking" was alleged to have occured as a result of the annual filing requirements of the Federal Land Policy and Management Act of 1976 (FLPMA) which extingishes mining claims for failure to meet the FLPMA requirements.[7] The Locke court was required to evaluate the nature of the property interest which relates to unpatented mining claims. Said the Court:

> Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, we have recognized that these interests are a unique form of property. The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. Id.

The Court, in Locke, described the limitations which accompany the acquisition of an unpatented mining claim. Of particular import is the Court's observation that "Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests." Id. Thus, holders of unpatented mineral claims , including oil shale claimants, acquire their interest in the minerals on public land knowing that the government has broad powers to regulate their use of such land, which power extends to the extinguishment of all of the claimants interest for mere failure to make simple procedural filings.

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[7] The purpose of applying FLPMA's filing provisions to claims located before the Act was passed, was to rid federal lands of stale mining claims and to provide for centralized collection by federal land managers of comprehensive up-to-date information of the status of recorded but unpatented mining claims--a legislative purpose the Court found to be legitimate. United States v. Locke, 471 U.S. 84 (1985).

Moreover, the Locke Court pinpointed, with precision, the exact nature of the unpatented mineral claim holders investment-backed expectations:

> ...the property right here is the right to a flow of income from production of the claim. Similar vested economic rights are held subject to the government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life. Id. (emphasis added)

The core property interest of the unpatented mineral claim holder was obvious to the Court and is plain to any objective observer- the claim gives rise to the right to mine minerals for profit. To the extent that the oil shale claim holder possesses a property right, it is the right to mine and remove oil shale for profit. Indeed, the law under which such claims were made is the Mining Law of 1872- not the real estate speculation law.

The fact that Congress appended to the Mineral Law of 1872 the option to secure a patent on the land where oil shale was discovered and located does not add to the claim holder's property rights. The oil shale claim holder who chooses not to patent the claimed land may go forward and extract oil shales to exhaustion. However, the claim holders have no vested property right in patenting the land upon which their claim is located. To vest their interest in such land, the claimant had only to follow follow the procedures for patenting the land including the payment of a ridiculously low per acre fee. As the Supreme Court noted in Locke, the claim holders "could have fully protected their interests against the effect of the statute by taking the minimal step of patenting the claims." Id.

Consistent with the view that the option to patent a mining claim is an insubstantial property right that has not vested is the decision of the Court of Appeals for the Ninth Circuit in Alaska Miners v. Andrus, 662 F.2d 577 (1982). That case involved the cut-off of a mineral claim holder's option to patent their claims located on lands conveyed to native Americans under the Alaska Native Claims Settlement Act. The court noted that the ability to patent claimed mineral land is not essential to the right to mine that land:

> ... in Alaska as in many other states, many miners never bother to seek patents. Since there is really no incentive for miners to seek patents, it was incumbent upon Congress to place some kind of time limit which would clearly prevent miners from presenting claims in the distant future. Id. at 579.

The Ninth Circuit flatly rejected the unpatented mineral claimant's argument that they possessed a vested interest in patenting their claims:

> The argument of appellants that a valid location of a mining claim segregates that area of the claim from the public domain and thus prevents the United States from disposing of the legal title is manifestly unsound....a valid mining location does not limit the rights of the United States as the paramount title holder. Id.

The thrust of the Alaska Miner's opinion is that the government may withdraw or convey title to land that is otherwise subject to valid unpatented claims. Id. at 580.

B. Investment-backed Expectations and Diminution of Value

The insubstantial nature of oil shale claimants' option to patent their claims is further underscored by the fact that most of the outstanding shale oil claims have never seen the extraction of oil shale therefrom; even though the claims are more than sixty years old. Surely, Congress did not intend to grant a vested right to purchase a fee simple interest in public lands to shale oil claimants who have failed to mine the land claimed for that purpose almost three-quarters of a century ago. Obviously what Congress contemplated was the extraction of oil shale from located claims, not the conveyance of public lands decades after claim location to claimants who never have extracted oil shale, and who would not be required to mine if they are successful in securing a patent.

As the Supreme Court has looked to the "reasonable investment backed expectations" of those asserting a "taking", such an analysis would be appropriate here. As noted above, the investment backed expectations of the shale oil claimant is the expectation of mining the mineral at a profit. S.2089 does not extinguish oil shale claimants' expectations of profit from mining. The right to mine valid unpatented oil claims if fully preserved by the bill, which gives claim holders the option to convert the claims to a lease, or continue to hold the claim subject to certain regulatory requirements. The reasonable investment backed expectations of shale oil claimants are not affected by the bill.

Another consideration the Supreme Court has examined in "taking" cases is the extent to which an alleged "taking" has impacted on the property interest involved. In reviewing this impact the Court has refused to separate the property into discrete segments when the alleged diminution of value of the property is analyzed. Thus in *Penn Central, supra,* 438 U.S. at 137, the court refused to focus on the nature of the uses that were prohibited by land use regulations without also examining the many profitable uses to which Grand Central Station could still be put. Last term the Court again recognized the efficacy of such an approach in *Keystone Bituminous Coal Operators v. DeBenidictis, supra,* 107 S. Ct.at___ where the fact that coal operators stood to leave millions of dollars worth of coal unmined because of state subsidence control regulations was not found to be a taking; the Court observed that reasonable profits could be derived from the coal lands, notwithstanding the fact that millions of dollars of coal were required by regulation to remain in the ground.

IV. CONCLUSION

The diminution of value of oil shale claim holders' interests occasioned by S.2089 is minimal; the claims can still be mined and profits made. As far as reasonable investment backed expectations are concerned, the expectation of those who patented oil shale claims more than sixty years ago was to make a profit from extracting oil shale and not from land speculation unaccompanied by mineral development; similarly S.2089 does not interfere in any substantial way with such expectations.

Observations made by the Supreme Court in Locke place the S.2089 "taking" concerns in proper perspective:

> Regulation of property rights does not "take" private property when an individual's reasonable investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed. ... "What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?' Id.

In my view S.2089 suffers from no constitutional infirmities. The bill significantly advances the public welfare exhibiting little impact on the reasonable ecpectations of oil shale claimants.

Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law

by Patrick C. McGinley

Editors' Summary: The theory that a land use regulation may "go too far" and deny to the landowner the use of his or her property in derogation of the Takings Clause of the Constitution has long been an inexact, even confused, doctrine. In the term just ended, the Supreme Court was presented with three cases in which a land use regulation was alleged to have exceeded the police power and "gone too far," but in deciding the individual cases the Court did not successfully clarify the underlying theory. In this Article, Professor McGinley traces the development of the regulatory takings doctrine, and argues that the present-day confusion stems from a fundamental misunderstanding of Justice Holmes' teachings in Pennsylvania Coal Co. v. Mahon. *The result of this confusion has been a resurrection of the long-discredited "economic substantive due process" analysis in this area. Professor McGinley argues that Justice Holmes was in fact advancing a consistent and cogent constitutional formula to determine whether a land use regulation had indeed "gone too far," and concludes that the freewheeling* Lochner*-style takings analysis currently employed should be scrapped as a threat to fundamental constitutional values.*

Lawyers whose practice focuses on environmental law know first hand the perplexing confusion surrounding constitutional "taking" analysis as it relates to land use and other environmental regulation.

One wonders how many law firm word processors are primed with pleadings and briefs explaining how one environmental regulatory initiative or another contravenes the Fifth Amendment's admonition that "private property [shall not] be taken for public use, without 'just compensation.' "[1] Such claims allege what has come to be known as "regulatory taking" of private property.

The following discussion traces the development of the regulatory taking doctrine to its roots in the now disfavored use of constitutional "economic substantive due process" analysis, and the contemporary argument that this taking doctrine may be used as a vehicle for invalidating environmental, land use, and other "police power" regulatory initiatives. Interestingly, the extent to which the conflicting maze of taking law parallels the discredited economic substantive due process mode of judicial review has been little noted.

This discussion is most timely, for the Supreme Court recently has decided a case that offered an appropriate opportunity for the Court to recognize the substantive due process origins of "regulatory taking" theory. The legal and factual components of that case, *Keystone Bituminous Coal Ass'n v. DeBenedictis,*[2] are substantially similar to those considered by the Court in its leading case on "regulatory taking," *Pennsylvania Coal Co. v. Mahon,*[3] decided more than five decades ago. The Court found that the more recent statute "presents the same type of environmental concern that has been the focus of so much federal, state and local regulation in recent decades."[4] Both *Mahon* and *Keystone* involved Pennsylvania statutes regulating surface land subsidence caused by underground coal mining. Although the *Keystone* case seemed "on all fours" with *Mahon*, a law similar to the one invalidated by the Court in *Mahon* was upheld in *Keystone*.

In *Keystone*, the Court had an opportunity to either modify its current approach to "regulatory takings" as a misdirected application of long-rejected constitutional principles, or recognize its similarity to economic substantive due process and place its approving imprimatur on it. As discussed below, the Court did neither.

The Legacy of *Mahon*

The focal point of any consideration of a regulatory tak-

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[1] U.S. Const. amend. V. The Fifth Amendment acts as a limitation on the power of the federal government. The Just Compensation Clause has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Chicago Burlington & Quincy R.R. Co. v. Chicago, 106 U.S. 226 (1897).

[2] 17 ELR 20440 (U.S. Mar. 9, 1987). For a review of the issues in this case see Comment, *The Supreme Court: 1985-86 Term in Review and a Look Ahead,* 16 ELR 10325, 10329 (1986). The case was argued before the Court on November 10, 1986, and decided March 9, 1987. *Keystone* is the first of a trilogy of important land-use cases decided in the Supreme Court's 1986-87 term involving the regulatory takings issue. The second case, First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 17 ELR 20797 (U.S. June 9, 1987), held that a so-called "temporary" regulatory taking, in which the landowner is denied all use of his or her property for a time, is not different in kind from a permanent taking. Accordingly, the landowner must be compensated for the value of the property during the time in which the property was taken. The third regulatory takings case, decided just prior to the end of the term, Nollan v. California Coastal Comm'n, 17 ELR 20918 (U.S. June 26, 1987), held that a governmental requirement that landowners along a beachfront allow the public access across their private beach as a condition of a building permit is an uncompensated government taking. The Court noted that conditioning the permit on the grant of a public easement would be a lawful land use regulation *if* the easement substantially furthered "public purposes"; however, the regulation at issue in *Nollan* failed in this regard. Both *First English Lutheran Church* and *Nollan* relied on *Mahon* as the analytical touchstone for determining whether a taking had occurred, and neither departed significantly from the traditional, and somewhat muddled, takings principles. *See First English Lutheran Church,* 17 ELR at 20790 (quoting *Mahon,* 260 U.S. at 415), and *Nollan,* 17 ELR at 20919-20.

[3] 260 U.S. 393 (1922).

[4] *Keystone,* 17 ELR at 20441.

ing issue must start with the statement in *Mahon* that "[t]he general rule at least is, that while property may be regulated to a certain extent, if it goes too far it will be recognized as a taking."[5] In the half century since it was penned, this oft-cited statement of Justice Holmes has become a central feature of constitutional "taking" jurisprudence and is now the basic tenet of the "regulatory taking" model.

Although much maligned by the commentators, *Mahon* continued to be the analytical vortex around which was gathered the swirling winds of controversy that have consumed the confusing debate between and among the bar, scholars, and jurists. The focus of this debate was on the question posed by Holmes: at what point does a particular exercise of police power go "too far" and thus must be "recognized as a taking"?

Rhetorical exasperation with the Supreme Court's "taking" jurisprudence is legion in the scholarly writing on the subject. One commentator rather aptly observed that "[i]n truth, the collected decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker's coat."[6] Justice Blackmun, writing for a majority of the Court in a recent case, echoed this sentiment when he noted that "[t]he attempt to determine when regulation goes too far that it becomes, literally or figuratively, a 'taking' has been called 'the lawyer's equivalent of the physicist's hunt for the quark.' "[7]

Criticism of the Supreme Court's constitutional taking jurisprudence is not surprising in light of the Court's inability to set forth a workable analytical framework to bring rationality and consistency to the discourse. Neither rationality nor consistency could possibly flow from decisions marked by statements like that of Justice Brennan in *Penn Central Transportation Co. v. City of New York*:[8] "[T]his court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[9]

This is not to suggest that there have not been attempts to derive a "set formula" that the courts could apply to instances where litigants claim that the constitutional taking proscription has been violated. On the contrary, judges and legal scholars have spent great energy and time developing and discussing a plethora of such "formulas." From this effort have evolved theories relating to "noxious use," "distinct investment backed expectations," "reciprocity of benefits," "diminution of value," "physical invasion," "presumptive" and "per se takings," "spillover effects," and other analytical approaches.[10] Indeed, Justice Brennan himself has in recent years set about to design such a formula to be applied in cases involving certain attributes of land use regulation.[11] Notwithstanding these efforts, this area of the law has not been clarified and the courts continue to generate contradictory opinions utilizing various aspects of the extant "formulas," none of which have garnered anything approaching a consensus in the view of bench, bar, and academe.

In the recently decided *Keystone* case, the Court did make certain observations about taking jurisprudence that suggest the Court may be open-minded about reconsidering *Mahon's* influence on regulatory taking jurisprudence. For example, the Court observed that a substantial portion of Holmes' opinion was "advisory," and that Holmes had not disputed Justice Brandeis' dissenting view in *Mahon* that "the state had an absolute right to prohibit land use that amounts to a public nuisance."[12] Thus the *Keystone* Court emphasized that:

> Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.[13]

Despite these indications that the meaning of *Mahon* is still open to scrutiny by the Court, *Keystone* contains the now almost boilerplate references to "regulatory takings," "diminution of value," "distinct investment backed expectations," and similar phrases that have become the confusing talismans of post-*Mahon* taking jurisprudence.

Constitutional Text and the Taking Debate

Obviously, constitutional jurisprudence is based, at least at the initial level of analysis, on an interpretation of the document's text and the fair implications that can be drawn therefrom; the taking debate is no different. The focus in this controversy rests upon three separate constitutional considerations: the Fifth Amendment's "Due Process" and "Just Compensation" (Eminent Domain) Clauses and the implied "police power" inherent in the governance of a sovereign state.

The "Just Compensation" Eminent Domain Clause

When one speaks of "taking" jurisprudence, the most obvious reference is to that portion of the Fifth Amendment

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5. *Mahon*, 260 U.S. at 415.

6. Stoebuck, *Police Power, Takings and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1059 n.11 (1980).

7. Williamson Co. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. ____, ____, 105 S. Ct. 3108, 3124 (1985), *citing* C. Haar, Land Use Planning 766 (3d ed. 1976).

8. 438 U.S. 104, 8 ELR 20528 (1978).

9. *Id.* at 124, 8 ELR at 20533.

10. *See, e.g.*, B. Ackerman, Private Property and the Constitution (1977); N. Bowie, Towards A New Theory of Distributive Justice (1971); R. Epstein, Takings, Private Property and the Power of Eminent Domain (1985); Costonis, *Presumptive and Per Se Takings: A Decisional Model For The Taking Issue*, 58 N.Y.U. L. Rev. 465 (1983); Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 Rutgers L. Rev. 243 (1982); Sax, *Takings, Private Property and Public Rights*, 81 Yale L. Rev. 149 (1971); Sax, *Takings and the Police Power*, 74 Yale L. Rev. 30 (1964); Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972).

11. *See, e.g.*, San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 636, 11 ELR 20345, 20351 (1981) (Brennan, J., dissenting).

12. *Id.* at 20443, 20444. Justice Stevens, writing for the five-Justice majority in *Keystone* noted that Holmes had disputed Brandeis' conclusion that the 1921 Pennsylvania law was a legislative attempt to abate a public nuisance. Holmes had said in *Mahon* that "this is the case of a single private house . . . the damage is not common or public." *Id.* at 20443 (quoting *Mahon*, 260 U.S. at 413-14). Stevens went on to observe the "Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances. . . . Under our system of government," said Stevens, "one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property." *Keystone*, 17 ELR at 20445.

13. 17 ELR at 20445 (citations omitted) (quoting Mugler v. Kansas, 123 U.S. 623, 665 (1887)).

that literally makes use of the word as a central consideration of this Bill of Rights protection afforded citizens: "nor shall private property be taken for public use, without just compensation."[14]

This clause of the Fifth Amendment does not mention the power of eminent domain—the inherent sovereign power to take private property for public uses such as a road, a government building, or a park. However, the "Taking" clause has been generally accepted as a "tacit recognition of a pre-existing power to take private property for public use." Thus, the requirement that compensation be paid when private property is taken for a public use suggests that the framers accepted such usurpation of private property rights as a legitimate exercise of governmental power if the property owner received fair payment for the property taken.[15]

The Due Process Clause

A second clause of the Fifth Amendment is also relevant to "taking jurisprudence." The Due Process Clause provides in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or *property*, without due process of law . . . ."[16]

An emerging theory asserts that in many cases references to "takings" are not references to the Just Compensation/Eminent Domain Clause, but rather are metaphoric illusions to the Due Process Clause.[17]

It is the Due Process Clause that was primarily used in the first 30 years of the 20th century by the Supreme Court to strike down legislation that "took" the value of private property as an incident to regulation of private conduct. This use of now discredited "substantive due process" analysis had its genesis in regulatory rate cases, such as *Munn v. Illinois*,[18] and industrial regulation cases, including *Lochner v. New York*.[19] Commentators who support this theory suggest that the source of confusion in constitutional "taking" analysis has been the judicially fueled doctrinal convergence and intertwining of the Due Process and Just Compensation/Eminent Domain Clauses.[20]

The Police Power

Like the power of eminent domain, the "police power" is not a term grounded in the express language of a particular clause of the Constitution. Rather, in this context, it is a short-hand term referring to the inherent power that lies at the heart of democratic government—the broad power to enact and enforce legislation intended to protect public health and advance public safety and the general welfare.

In a classic statement outlining the scope of the police power, Ernst Freund observed:

> The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common-law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control that constitutes the essence of the police power.[21]

Whether a "taking" allegation is founded on the Just Compensation/Eminent Domain Clause or the substantive content of the Due Process Clause of the Fifth or Fourteenth Amendments, the central issue in every taking case is whether there has been a constitutionally permissible exercise of the police power.

Due Process, Eminent Domain and the Police Power: The First Century of Constitutional Interpretation

Just Compensation and Eminent Domain

In the most comprehensive and widely recognized historical analysis of the issue to date, it was found that

> the concept of "taking" originally referred to the seizure of lands by the government, and that it retained this meaning through the time it was incorporated into our constitution and for a century thereafter. Only around the turn of the Twentieth Century—a period of conflict between freewheeling growth and expansion and an emerging concern that government regulation was needed—did the courts begin to expand the meaning of "taking" beyond the original conception.[22]

Thus, contrary to the current view, there was once a "set formula" to determine whether there had been an unconstitutional taking: "It seems to be settled that, to entitle the owner to protection under this clause the property must actually be taken in the physical sense of the word . . . ."[23]

An unconstitutional taking, then, was originally limited by the literal terms of the Just Compensation Clause of the Fifth Amendment. When the government physically took private property with the intention or the effect of putting it to some public use, the private property owner either had to be fairly compensated or the government confiscation would be judicially nullified.

The Police Power

It was clear at the end of the 19th century that a legitimate exercise of the police power and a government physical confiscation of private property were conceptually quite different. An exercise of the power of *eminent domain* mandated the payment of just compensation; a valid exercise of the *police power* never required compensation, even though property values might be diminished. In *Mugler v. Kansas,*[24] the leading case setting forth this perspective, the first Justice Harlan observed that the police power is not burdened with requirements that compensation be paid:

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[14] U.S. Const. amend. V.

[15] *See* United States v. Carmack, 329 U.S. 230, 241-42 (1946); F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 U. Cal. L. Rev. 596 (1954).

[16] U.S. Const. amend. V (emphasis added).

[17] *See Williamson County Regional Planning Commission*, 473 U.S. at ____ n.15, 105 S. Ct. at 3124 n.15 (citing commentators who espouse this view). *See also* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 6 ELR 20810, 20811 (1976).

[18] 94 U.S. 113 (1877).

[19] 198 U.S. 45 (1905). *See also* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[20] For a discussion of this perspective, see *Williamson County Planning Commission*, 105 S. Ct. at 3122-23.

[21] E. Freund, The Police Power (1904); *see also* Noble State Bank v. Haskel, 219 U.S. 104 (1911).

[22] F. Bosselman, D. Callies & J. Banta, *supra* note 15, at 51.

[23] T. Sedgwick, A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law 519-20 (1st ed. 1857). *See also* Commonwealth v. Alger, 66 Mass. (7 Cush.) 53 (1853).

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use. . . . In the one case, a nuisance is abated; in the other, unoffending property is taken away from an innocent owner.[25]

In clear and unequivocal language the Court brushed aside the argument that has been advanced as the core of "regulatory taking" analysis: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[26] *Mugler* dealt a devastating, but not a fatal blow to the theory that when a diminution of private property values occurs as a result of enforcement of police power legislation, a compensable taking had occurred.

Notwithstanding Justice Harlan's emphatic statements, the general supremacy of the police power over rights of property was not resolved by *Mugler* and similar cases of the late 19th century. Other forces were at work in American life that set the course of constitutional analysis of due process, police power, and eminent domain on a collision course.

Due Process

The Fifth and the Fourteenth Amendments speak of due process. The Due Process Clause in each provides some measure of protection of life, liberty, and property from government deprivation.

In *Munn v. Illinois,*[27] the Supreme Court considered state-imposed maximum rates that the owner of a grain warehouse or elevator could charge for grain storage. The owners contended that the Due Process Clause of the Fourteenth Amendment prohibited states from setting rates in such a way as to deny them the full profit they might gain in a free market.

The Supreme Court made short shrift of these arguments in *Munn,* emphasizing, as it did a few years later in *Mugler v. Kansas,* the breadth of the police power, and the limits of the due process and just compensation guarantees. Said Chief Justice Waite:

> Under these [police] powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the common good. . . . [W]e think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.[28]

Flatly rejecting the grain warehouse owners' substantive due process argument, the Court denied even that a judicial remedy was available: "We know that this is a power which may be abused; but that is no argument against its existence. For protections against abuses by legislatures the people must resort to the polls, not to the courts."[29]

Just one year later, in 1878, in the course of sustaining a special assessment against property owners, the Court underscored this point when it expressed surprise at the "strange misconception" that the Due Process Clause was a means to challenge the merits of legislation.[30]

Thus, until the close of the 19th century the Supreme Court had no problem identifying a "set formula" for distinguishing valid exercises of the police power from unconstitutional "takings" of property without payment of just compensation. The rules were clear. If regulation of land, personal property, or business activities went "too far," citizens had recourse to the legislature, but not the courts. Only when the government actually occupied land, physically took, or otherwise confiscated private property, was compensation required.[31]

The Industrial Revolution, The Demise of an Agrarian Economy and the Ascendency of Substantive Due Process

At the time *Mugler v. Kansas* and *Munn v. Illinois* were decided, America was poised on the crest of a new economic tide that within three decades would radically change the way Americans lived and worked. It would also wreak havoc with the clearly defined constitutional doctrines explained so definitively in those cases.

In an especially enlightening discourse on the post-*Munn-Mugler*-era, which saw the meteoric rise and fall of substantive due process analysis, Professor Stephen Siegal observed that the time was "a period of controversy and change in American constitutional law. During that period, economic forces challenged and ultimately overthrew traditionally accepted social beliefs and legal doctrines."[32] Siegal's work traces the evolution of the American economy from its small-scale, generally agrarian-oriented roots, to large-scale industrial enterprises, which could dominate the market because of, rather than in opposition to, market forces. This radically changing economic base caused a rethinking of many traditional legal concepts.[33]

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24. 123 U.S. 623 (1887).

25. *Id.* at 668-69.

26. *Id.*

27. 94 U.S. 113 (1877).

28. *Id.* at 125.

29. *Id.* at 134.

30. Davidson v. New Orleans, 96 U.S. 97, 104 (1878).

31. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court held that any permanent physical occupation authorized by the government is a taking, regardless of the public interest it may serve. This holding is consistent with the clear language of the Just Compensation/Eminent Domain Clause of the Fifth Amendment.

It has been suggested, however, that this decision rejected the development of a "unified taking analysis" wherein due process and eminent domain principles could be combined. Thus, according to one commentator, the Court has "further muddied the water of taking jurisprudence." Note, *Lorretto v. Manhattan CATV Corp., Permanent Physical Occupation As A Taking,* 62 N.C.L. Rev. 153, 161 (1983). Such a view ignores the obvious; the Due Process Clause and the Just Compensation/Eminent Domain Clause deal with separate and distinct constitutional concerns. Each clause expresses independent concerns of the framers; these considerations should be recognized and given weight by courts rather than being subsumed in some theoretical "unified taking theory."

32. Siegal, *Understanding The Lochner Era: Lessons From The Controversy Over Railroad and Utility Rate Regulation,* 70 Va. L. Rev. 187 (1984).

33. Siegal concisely describes this development:

For example, legislatures turned from subsidizing to regulating railroads. Railroads concentrated power and wealth; within a few decades they became virtually the lifeblood of the new industrial economy and had garnered sufficient power to hold the farm economy and new large scale industrial enterprises hostage to railroad haulage rates.[34]

The railroads abused their economic power mainly by imposing exorbitant rates and discriminating among customers.[35] An alarmed public clamored for reform, and the legislatures responded by setting maximum rates in a variety of commercial enterprises. *Munn* involved rate regulations for grain storage, for example, but its holding controlled six other railroad rate cases as well. These cases are known collectively as the *Granger Cases*.[36]

The broad interpretation of the police power and the sweeping rejection of the substantive due process attack on legislative ratemaking in *Munn* and the *Granger Cases* soon came under fire. Like Justice Field, who vigorously dissented in *Munn*,[37] they feared the legislative exercise of a police power unbridled by judicial review.[38] *Munn's* expansive view of the police power was seen as a threat to the property interests of the new "corporate America."[39]

Jurists and commentators who shared this concern about the breadth of the holding in *Munn* cast about for some theory that would limit legislative exercise of the police power. Their search led to theories such as that of Justice Brewer, in which regulatory initiatives that set rates so low that a "fair return" on investment could not be realized ought to be judicially rejected as the virtual equivalent of physical confiscation of property.[40]

After two decades of controversy and analytical gestation, in *Smyth v. Ames*[41] the Supreme Court announced a test that stood for 40 years as the rule by which rate regulation could be distinguished from confiscation. The touchstone of *Smyth v. Ames* was a "fair return" on the "fair value" of a railroad's property.[42]

It was only a short conceptual step from *Smyth v. Ames* to *Lochner v. New York*,[43] the landmark case which launched the era of intrusive judicial application of substantive due process analysis to legislative exercise of the police power. In *Lochner*, the New York legislature had enacted a law limiting the hours of work of persons employed in bakeries.[44] The *Lochner* Court declared the New York law unconstitutional, professing a deep-rooted concern for the freedom of the working man and woman to freely contract for their labor.[45]

Thus the Court held that the right of a person "to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment."[46] The Court emphasized that there were, of necessity, limits to the police power: "[o]therwise the . . . States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to Conserve the morals, the health or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be."[47]

The great deference shown in the *Munn v. Illinois*[48] and *Mugler v. Kansas*[49] was vitiated by the Court's refusal to imbue legislative exercises of the police power with a presumption of validity. The authority of the states to act to protect the public welfare through the police power was severely curtailed.

To the author of *Mugler*, the first Justice Harlan,

> With the appearance of self-sustaining, large scale industrial concerns at the end of the nineteenth century, economic theory reversed itself and began to teach that economic concentration was inevitable. Modern technology, it was said, had undermined the validity of traditional economic thought about defacto monopolies. Modern technology involved the efficiencies of scale and the economics of sunk costs that allowed large-scale de-facto monopolies to defend themselves successfully against competition.

Siegal, *supra* note 32, at 203. *See also* R. LUSTING, LIBERALISM, THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY 1890-1920, at 128 (1982).

[34] It has been observed that in America it was the railroads that first drew public attention to the abuses that could accrue from combination of corporate power and wealth:

> [T]o a greater extent than any other segment of the economic system, railroads and utilities achieved the large scale, concentrated, and interdependent form that . . . brought forth government intervention. The regulation of railroads and utilities . . . represented the cutting edge of the struggle between rights of property and the emergent administrative state. Both the function and the scale of railroad and utility undertakings meant economic and political power, power which was exercised and misused without hesitation. Corruption of public officials and discrimination among customers was endemic.

Siegal, *supra* note 32, at 188.

[35] *Id.* at 194.

[36] Stone v. Wisconsin, 94 U.S. 181 (1877); Winona & St. P. R.R. v. Blake, 94 U.S. 180 (1877); Chicago M. & St. P. R.R. v. Ackley, 94 U.S. 179 (1877); Lawrence v. Chicago & Nw. Ry., 94 U.S. 164 (1877); Piek v. Chicago & Nw. Ry., 94 U.S. 164 (1877); Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877).

[37] *Munn*, 94 U.S. at 136.

[38] For a review of commentary critical of *Munn*, see 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 574-96 (1922).

[39] In a companion case to *Munn*, Justice Field voiced the concern that

> so long as that decision [*Munn*] remains, it will be a waste of words to discuss the questions [raised] in these cases. That decision, in its wide sweep, practically destroys all the guarantees of the constitution and of the common law invoked . . . for the protection of the rights of the railroad companies. Of what avail is the constitutional provision that no state shall deprive any person of his property except by due process of law, if the state can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property?

Stone v. Wilson, 94 U.S. 181, 186 (1877).

[40] *See* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 399, 410 (1894). In this case, Justice Brewer argued that the Just Compensation/Eminent Domain Clause protected railroads from rates that had been set too low by government regulators to cover costs of operation and other inherent expenses of doing business—interest charges on loans, mortgages, and the like. Justice Brewer's analysis and other theories like the "prudent investment" and "reproduction cost" theories competed for acceptance among the critics of the sweeping holding of *Munn*.

[41] 169 U.S. 466 (1898).

[42] The decision was interpreted to mean that the "fair return" due the company was a competitive dividend. *See* Siegal, *supra* note 29, at 226-27.

[43] 198 U.S. 45 (1905).

[44] Ten hours per day and sixty hours per week were the legislatively prescribed limits of the bakery employees work day and week. *Id.* at 46 n.1.

[45] *Id.* at 59. Said the Court:

> No trade, no occupation, no mode of earning one's living, could escape this all prevading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

[46] *Id.* at 56.

[47] *Id.* at 56-57.

[48] 94 U.S. 113 (1877).

[49] 123 U.S. 623 (1887).

Lochner's disregard of majoritarian principles was anathema.[50] Justice Harlan was not, however, the only dissenter in *Lochner*. Justice Holmes identified the source of such a radical departure from precedent as the evolving economic theory that had developed in unison with the transformation of America from a small enterprise agrarian-based economy to the world of industrial giants and corporate domination of the marketplace. To Holmes, this dramatic change in the machinations of the marketplace was no cause to recast well-established constitutional principles:

> This case is decided upon an economic theory which a large part of this country does not entertain. . . . But a Constitution is not intended to embody a particular economic theory, whether paternalism and the organic relation of the citizen to the state or *laissez faire*.[51]

Justice Harlan predicted that *Lochner* would "involve consequences of a far reaching and mischievous character," for it would "seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens.'"[52] Passage of time proved how prescient Harlan was; from 1905, when *Lochner* was decided, until the mid-1930s the Supreme Court invalidated nearly 200 police power regulations on substantive due process grounds.[53]

The Misreading of Holmes' Opinion in *Mahon*

The preceding discussion noted that Justice Holmes categorically rejected the judicially crafted limitations on legislative police power initiatives. How then can one explain Holmes' opinion in *Pennsylvania Coal v. Mahon*, where the Court struck down a statute that typified state police power enactments?

If one accepts the conventional wisdom, *Mahon* is a "taking" case that stands for the proposition that it is within judicial discretion to determine when an exercise of the police power goes "too far" and will be declared a compensable taking. However, the Court's opinions in the last 50 years reflect the uncertainty engendered by a misapprehension of Holmes' statement in *Mahon* that if a regulation of property "goes too far, it will be recognized as a taking.'"[54]

The conventional view of *Mahon* as a "taking" case, grounded in the Fifth Amendment's Just Compensation/Eminent Domain Clause, has recently been the target of cogent and compelling criticism. State cases from California and New York[55] reject the extant interpretation of *Mahon*, arguing instead that *Mahon's* reference to a "taking" was merely a metaphor for a substantive due process violation.

Having observed Holmes' stinging rebuke of the Court's economic substantive due process analysis in his *Lochner* dissent, this interpretation of *Mahon* suggests that rather than rewriting the Constitution, as some critics suggest,[56] Holmes' position is entirely consistent with his dissent in *Lochner* and his repeated reliance on *Munn v. Illinois* and *Mugler v. Kansas* in cases spanning his tenure on the Court.

In a recent, concise, and most persuasive discussion of "regulatory takings" it was argued that there has been a pervasive judicial misreading of Holmes' words in *Mahon:*

> According to [the Court] the source of the regulatory taking theorem is Justice Holmes' opinion in *Pennsylvania Coal:* "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." An objective look at the opinion in *Pennsylvania Coal*, however, shows that this statement does not support [this] hypothesis. A careful reading of the opinion shows that Holmes used the word "taking" not to describe an event requiring payment of just compensation, but as a shorthand description of an invalid regulation.[57]

Upon reflection, it appears obvious that Holmes did not mean that when police power regulation goes "too far" it becomes an exercise of eminent domain by the state; as noted above, a compensable eminent domain "taking" had always meant a physical occupation or confiscation of property for public use. When a police power regulation diminishes the value of private property in furtherance of public health, welfare, and safety one cannot seriously contend that such a regulation is also an exercise of the power of eminent domain absent some actual governmental occupation or use.

The point Holmes was really making with his observation about a regulation going "too far" was that even though the breadth of the police power is exceedingly wide and entitled to great judicial deference, on some rare occasions its effect on an individual is so egregious that it cannot be upheld unless the government compensates the person for his or her loss. In *Pennsylvania Coal* Holmes emphasized precisely this point:

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[50] *Lochner*, 198 U.S. at 74 (Harlan, J., dissenting). Justice Harlan's dissent argued that legislative enactments should be judicially enforced as the will of the electorate "unless they are plainly and palpably, beyond all question, in violation of the . . . Constitution." *Id.* (citing Atkin v. Kansas, 191 U.S. 207, 223 (1903)). Justice Harlan did, at a later time, recognize economic substantial due process as having some vitality with regard to government regulation of business. *See* Adair v. United States, 208 U.S. 161 (1908) ("No evils arising from such legislation [as the New York bakery law] could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the peoples' representatives.").

[51] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[52] *Id.* at 73 (Harlan, J., dissenting). Holmes viewed the *Lochner* holding with undisguised disdain:

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shiboleth for some . . . , is interfered with by school laws, by the post office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Id. at 75 (Holmes, J., dissenting).

[53] G. Gunther, Constitutional Law 564-65 (9th ed. 1975).

[54] *Mahon*, 260 U.S. at 415.

[55] Agins v. City of Tiburon, 24 Cal. 3d 266, 9 ELR 20260 (1978), *aff'd*, 447 U.S. 255, 10 ELR 20361 (1980), *disapproved in part in*, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 17 ELR 20787 (U.S. June 9, 1987); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 6 ELR 20810 (1976). For an enlightening discussion of this emerging view, see Stoebuck, *supra* note 6, at 1097-99.

[56] *See* F. Bosselman, D. Callies & J. Banta, *supra* note 15.

[57] Siemon, *Of Regulatory Takings And Other Myths*, 1 J. Land Use & Envtl. L. 105 (1985). *See also* Comment, *Testing the Constitutional Validity Of Land Use Regulations: Substantive Due Process As A Superior Alternative To Takings Analysis*, 57 U. Wash. L. Rev. 715 (1982). A majority of the Supreme Court has recently indicated its awareness of this alternative reading of *Mahon; see* Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. ____, 105 S. Ct. 3108 (1985). The Court found in that case that, whether a due process or a just compensation/taking analysis was used, the issue would not be ripe for adjudication. The Court left for future consideration the point discussed above.

> [S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration is the extent of diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to *sustain* the act.[58]

Holmes' intent is clear. There must be some limits to the police power—certainly not the type of substantive due process limits Holmes had decried in his dissent in *Lochner*—but some limits that would vindicate the interests protected by the Due Process and Contract Clauses. When those limits were exceeded in a given case, the government could have its way nonetheless—by compensating the property owner for losses incurred. In this way compensation would "sustain" the otherwise invalid regulation.

If such an interpretation of Holmes' words in *Mahon* is doubted, one need only look to a contemporaneous Holmes opinion:

> All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.[59]

Given Holmes' serious and deeply rooted objections to the Court's open-ended use of substantive due process to attack police power regulations, it is apparent that the Justice was articulating what he believed to be a viable alternative to a Lochnerian analysis. A careful reading of the cases suggests that Holmes' concerns were directed at maintaining the integrity of important constitutional principles: the need to uphold majoritarian judgments expressed in police power regulations and the protection of individual rights afforded citizens by virtue of the Due Process and Contract Clauses.

The great weight Holmes placed on upholding majoritarian values is evidenced by his recognition that even in those rare instances when the constitutional presumption of validity of a police power initiative is overcome, the government can still have its way if it fairly compensates the individual for the loss of his or her property. Indeed, rather than suggesting limits on majoritarian rule by limiting legislative exercise of the police power, Holmes opted for an even broader view of that governmental prerogative. By paying a citizen when a regulation placed too heavy a burden on him or her (i.e., had gone "too far"), government could avoid any due process concerns and advance its police power goals.

By suggesting that due process deprivations of property interests could essentially be cured by paying compensation, Holmes sought to accomplish a variety of interrelated objectives. Each objective relates to an integral component of the complex constitutional balance between personal rights, and the ability of government to advance the interests of the community.

Thus, it was Holmes' ingenious goal in *Mahon* and other cases to validate the Due Process Clause as a limited, rather than open-ended, guarantee of individual rights, to protect the interests advanced by the Contract Clause, and to give recognition to the need of democratic government to adhere to the will of the electorate.

When read in this light, the consistency of Holmes' position is apparent. Rather than attempting to "rewrite the constitution" as Bosselman, Callies, and Banta suggest in their widely cited work, *The Taking Issue*,[60] Justice Holmes' jurisprudence exhibits the external and internal consistency and faith in the basic good sense of the framers that has made him one of the foremost American jurists of the 20th century.

Conclusion

Reduced to its essence, *Mahon* is simply a case where, on the facts, the state law at issue had the effect of destroying the entire value of a coal company's property without advancing any important public interest. Notwithstanding the view of numerous judicial and scholary commentators, *Mahon* does not suggest that an invalid exercise of the police power requires compensation under the Just Compensation Clause of the Fifth Amendment.[61] Rather, Holmes' opinion in *Mahon* kept faith with the Court's recognition of the importance of majoritarian rule expressed in cases like *Mugler v. Kansas* and *Munn v. Illinois*. Contrary to the contemporary confusion of the Supreme Court's taking jurisprudence, these cases contained widely accepted "set formulas" to deal with cases where due process and eminent domain issues were involved. *Pennsylvania Coal Co. v. Mahon* was never intended to depart from the consistency and analytical integrity of the Court's prior decisions.

The misreading of Holmes' opinion in *Mahon* has led to a jurisprudence devoid of logic that threatens fundamental constitutional values. This threat lies in the resurrection of a substantive-due-process-like approach to judicial review in the guise of "taking" arguments. This approach has been advanced in large measure by those whose profit and balance sheet is adversely affected by legislative attempts to further public health, safety, and welfare.

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[58] 260 U.S. at 413 (emphasis added). Holmes suggests here and in other cases that "diminution of value" is an indicator of when a regulation goes "too far." However, this diminution of value test is certainly not applicable to situations where the police power is exercised to protect the public from immoral, unsafe, or similar noxious or nuisance activities. No reasonable person would argue that the government would have to compensate a cocaine dealer when his cache has been confiscated during a police drug raid. In such case the entire value of the private property is physically taken and its value to the owner is reduced to zero. So, too, in the case of environmental regulation of pollution causing activities—like the use of DDT—the government may reduce the value of a corporation's property to nothing without exceeding its police powers or the Just Compensation Clause.

[59] Block v. Hirsh, 256 U.S. 135, 156 (1921). In the same vein is Holmes' opinion in Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908):

> [T]he police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

Id. at 355.

[60] *Supra* note 15.

[61] *See* McGinley & Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L. REV. 420, 451 (1981).

Thus, corporations' and individuals' challenges to environmental and public safety regulations, as in *Keystone*, are commonly on grounds that their "investment backed expectations" have been upset.[62] For example, in one case, *Ruckelshaus v. Monsanto*,[63] a claim was made that chemical formulas for the manufacture of toxic materials were valuable trade secrets that the government could not acquire and disclose as part of its effort to regulate toxics, without paying compensation to the company possessing the formula. *Keystone* may signal a step away from the continuing viability of this sort of challenge; although the Court acknowledged that there was some upset of the "investment backed expectations," the degree of infringement shown did not materially affect those expectations.[64]

Given the substantial public interest in identifying toxic chemicals and tracking them as they are manufactured, used, and disposed, claims of constitutional violation such as that asserted in *Monsanto*, would seem patently absurd—were it not for the tortured and confused "taking" jurisprudence that has evolved in the wake of the misreading of *Mahon*.[65] Were such claims couched in terms of substantive due process rather than as a taking, they would be rejected as emphatically as was the company's position in *Williamson v. Lee Optical Company:*

> The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the Courts, to balance the advantages and disadvantages of the new requirement.
>
> The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, . . . "for the protection against abuses by legislatures the people must resort to the polls, not to the courts."[66]

Indeed, economic substantive due process never offered foes of majoritarian democratic rule a tool as potentially disruptive of democratic government as is advanced in the context of contemporary taking analysis. Somehow the Supreme Court's taking jurisprudence has been turned on its head; Justice Holmes, an arch foe of the *Lochner* line of economic substantive due process cases, has been transformed into the doctrinal guru of a taking analysis that is perhaps more pernicious than its conceptual twin.

What is needed is a return to the logic and consistency of *Munn v. Illinois*, *Mugler v. Kansas*, and, as was observed above, the intent of Justice Holmes in *Mahon*. There are "set formulas" clear enough to excise the confusion from the bottomless swamp of current "regulatory taking" discourse if the Court will but recognize the wisdom of an earlier time as articulated by some of the wisest of American jurists: Holmes, Brandeis, and the first Justice Harlan.

Once again the concept of eminent domain compensation would be restricted to its proper and obvious role; as a limitation on government occupation and use of private property for public purposes and as a vehicle to legitimize by compensation those unusual legislative initiatives that go "too far" in placing society's burdens on an individual.

The Due Process Clause would also serve an important yet limited function. It would not be used, as in *Lochner*, as a means for courts to strike down legislation enacted to advance public health, safety, and welfare; rather it would be utilized only as a limit on those particular exercises of government power that benefit the public while placing an "inordinate and fundamentally unfair" burden on innocent individuals.

The Court would then have interred the aberrant "takings" analysis of the last half century where it belongs: in the mausoleum of discarded and discredited constitutional doctrine where its conceptual twin, economic substantive due process, was buried 60 years ago.

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[62] 17 ELR at 20446.

[63] 467 U.S. 986, 14 ELR 20539 (1984) (disclosure under FIFRA).

[64] 17 ELR at 20447.

[65] Notwithstanding its use of the verbiage of post-*Mahon* regulatory taking cases, the Court's analysis in *Keystone* may signal the death knell for "regulatory taking" analysis where environmental regulations are intended to prohibit or abate private activities that create public nuisance-like effects. The *Keystone* opinion observes that

> [t]he special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 20445.

[66] 348 U.S. 483, 487, 488 (1955) (citations omitted).

Senator **Melcher**. Thank you.
Professor Leshy.

STATEMENT OF JOHN D. LESHY, ARIZONA STATE UNIVERSITY COLLEGE OF LAW, TEMPE, AZ

Mr. **Leshy**. Thank you, Mr. Chairman. In the interest of time, I will be quite brief.

My testimony, the thrust of my testimony is basically the same as Professor McGinley's. That is, I do not believe that S. 2089 poses any serious constitutional problems.

Let me talk briefly, a little bit more from the perspective of the Mining Law, as opposed to the perspective of the Constitution, because I think it is important when we consider the taking issue here to think of the taking of a property right, obviously the first question you ask when you have a takings question is, what is the property right at stake? And I think it is important to focus on the property right involved in a mining claim.

First, on the elimination of the patent option, which is present in both S. 2089 and H.R. 1039. First of all, what is the property right in a mining claim? There is no property right in a mining claim unless it is valid.

And in terms of these oil shale mining claims, it had to be valid as of February 1920, when the Mineral Leasing Act was adopted and grandfathered these claims, and it has to be valid today. And the claimants have to show compliance with all the other requirements of the Mining Law, including assessment work.

If you do not have a valid claim, there is no property right, and therefore no question of a taking. Therefore, the first proposition that establishes is that these claims had to be valid in 1920, and they have to be valid today.

And what that means is, each claimant has to have had 67 years in which to apply for a patent for these claims. Their failure to make application during that 67-year period was no fault of anybody's except their own. It was their own voluntary choice not to apply for a patent.

There is no constitutional principle that I know of that requires the government to keep an offer open once it has been made forever. There is no requirement for a perpetual kind of offer.

It has always been recognized to the contrary, that the government has the right to respond to the passage of time and change priorities by eliminating unperfected or future interests in property. And that is what we have in the patent situation.

Now, at the heart of all takings questions is the basic notion of what is fair. And I think that S. 2089 poses no unfairness to these claimants. They have sat on their patent option for about two-thirds of a century, and I think Congress clearly has the constitutional power to say, that is long enough.

Now, the essential fairness of closing off the patent option is underscored by a closer examination of how the patenting provision really works in the Mining Law. From the beginning, the government and the Congress in drafting the legislation and the miners themselves have always regarded the patent as a secondary minor feature of the statute.

It is a peripheral benefit. It is a frill. In the way the courts talk about takings issues, it is a twig in the bundle of sticks that comprise the potential property interests obtainable under the Mining Law.

The Supreme Court said as long ago as 104 years ago that the patent adds little. I am quoting, "The patent adds little to the security of the party in continuous possession of a mine he has discovered or bought. '

In short, it has always been unnecessary to acquire a patent in order to develop a mining claim and bring a deposit into production. And indeed, the consistent practice of the mining industry has been not to patent mines.

The Henderson Mine in Colorado, the company that developed that mine, spent $300 million investment in an unpatented mining claim. Many large open pit mines throughout the West are on unpatented mining claims. So that is the industry practice. So a patent really is practically meaningless in terms of security.

The Mining Law, furthermore, as its name demonstrates, is concerned with mining, not home sites, not ski areas, not health spas, or other non-mineral pursuits. Now, Congress did decide in 1872 that holders of valid mining claims might, if they fulfilled the requirements of this statute, obtain a patent, obtain complete fee simple title.

But at bottom, there is no dispute that the Mining Law and the miner's rights are designed to promote mineral development.

The Supreme Court unanimously in 1978 said, the Mining Law "surely was not intended to be a general real estate law." And Congress is not obliged to sit on the sidelines and watch the Mining Law used or misused for purposes that have little or nothing to do with mining.

The legislation before this Committee does not eliminate the core property right that exists in a valid mining claim. That core property right is the opportunity to mine.

The legislation's elimination of a peripheral gift of fee simple title to the land, available but not taken advantage of for 67 years, cannot under even the most imaginative stretching be considered a taking of property rights.

For the same reason that the opportunity to mine is not eliminated, S. 2089's requirement that the claimant elect between converting the claim to a lease or maintaining it as a claim raises no constitutional issue.

There is really no doubt in my mind that Congress could simply require all claims to be converted to leases. The question is, is the property right affected? The form of the property right, whether it is a claim, a lease, a contract, a permit, or whatever, is not constitutionally controlling.

What is constitutionally controlling is protecting the essence of the property right. The essence of the property right in a mining claim is the opportunity to mine. That is not affected by S. 2089.

Now, Congress, as we have discussed this morning, has several times done what this legislation proposes to do. That is, cut off the opportunity for patent. Most of those, that legislation has never been challenged.

A couple of times it has been challenged, and in each case the courts have given that argument very short shrift. The Freese case has already been discussed. The court said, the argument has no merit.

The Interior Department witness expressed some doubt about whether that decision was valid or good or would survive. I would point out that the Supreme Court, the miner in that case asked the Supreme Court to review the case, and the Supreme Court declined. The *Alaska Miners* case is to the same effect.

So case law and common sense really unite here. I think it is clearly constitutional for Congress to eliminate the patent feature.

Second, the requirement that the claimant or lessee diligently develop the claim or lease or forfeit it. I think the constitutional attack on this provision is even weaker.

Insofar as S. 2089 increases the assessment work requirement from the minimum of $100 set in 1872 and never raised since to $1,000 per claim per year, I do not see how it could possibly be argued that this is an unexpected, unwarranted infringement on claimant's property rights.

From the very beginning, Congress designed that figure, $100, to be a floor, not a ceiling. This statute has required, since 1872, unequivocally, not less than $100 worth of work each year.

The Department of the Interior has had the power ever since 1872, as well as the Congress, to raise that figure, if it wants to. And every claimant has been on notice of that fact from the mere reading of the statute.

A congressional decision now to raise the floor, even apart from the fact that raising it from $100 to $1,000 does not account for all the inflation that has taken place since 1872, it does no more than invoke a power that Congress reserved, clearly, plainly in 1872. And every mining claimant since 1872 knows that that power has been reserved.

Similar reasoning supports S. 2089's requirement that the claimant produce oil shale within 10 years in significant, marketable amounts, or forfeit the claim. And then there is the counterpart requirement, if it is converted to a lease, that the claim must produce oil shale in commercial quantities within 20 years, or the lease expires.

Now, it is true that these provisions change the practice that has grown up of mining claimants being permitted to hold their claims indefinitely without producing valuable minerals.

That practice, it is clear, mocks the congressional purpose in enacting the Mining Law. The congressional purpose is in the face of the Mining Law. It begins, an act "to promote the development of the mining resources of the United States."

It does not say an act to allow people to hold mining claims forever. It is designed to promote the development of mineral resources.

Surely it is within the power of Congress to give renewed meaning to that purpose by overcoming decades of lax administration, so long as the claimant is given a reasonable opportunity to comply.

And surely 20 years, if the claim is converted to a lease, or 10 years if the claimant elects to maintain the claim rather than convert, is a reasonable opportunity. Remember, it is worth recalling, these claims were valid in 1920 or they do not have property rights at all.

And therefore the claimants have already had 67 years to bring them into production. And this legislation proposes to give them an additional 10 or 20 years.

Now, the Mining Law originally was based on the customs of miners themselves. And in fact, the law itself incorporates the customs and practices of the Western miners.

There is no doubt in my mind that the early miners who fanned out across the West in the 1860s and 1870s would be shocked if they could see the current debate over whether mining claimants had the power to resist congressional efforts to bring their claims into production or forfeit them.

Those hardy prospectors, whose visions of El Dorado had brought them through many hardships, could not stand a miner sitting on a discovery. And in my written statement, and I will not go into it here, I have given several examples of the miners' rules that had very stringent requirements against sitting on a discovery, toward diligent development.

The framers of the Mining Law were as serious as the miners themselves about that, and the idea that once a mineral deposit was discovered, a claim located, it should be promptly developed or forfeited.

So all S. 2089 seeks to do is to reinforce that original purpose of the Mining Law, to bring valuable mineral deposits into production or otherwise free the land for the use of others.

In these circumstances, complaints of unfairness to the claimants must ring hollow. The Supreme Court has always recognized the power of the government to condition the retention of a property right on the performance of reasonable acts.

Statutes of limitation, laws of adverse possession, so-called marketable title acts are all based on that idea. And they are really universal features of property law worldwide. And Supreme Court decisions upholding those laws date back nearly to the framing of our Constitution.

The most recent, *Texaco* v. *Short,* which has been mentioned here, involved specifically mineral rights, and the Court was unanimous on the key point that the government had, in that case a state government, had the power to require mineral rights to be used, developed, or forfeited. The Court had no difficulty sustaining that statute.

In sum, well-accepted principles of constitutional law make clear that S. 2089 does not raise any serious constitutional questions.

One other general argument is offered as, what I think is sort of a last ditch effort to counter the overwhelming case law. And this argument is that despite what the Supreme Court has said about other property rights, the Mining Law is different. And property rights under the Mining Law have a special immunity from governmental regulation that other more ordinary property interests lack.

You see this, repeated references to the Supreme Court's statement, as the Department of the Interior witness said this morning, unpatented mining claims are a unique form of property. They are property in the fullest sense of the word, et cetera, et cetera.

But, the important thing to understand is that their unique character, which is based on the fact that they are largely possessory interests, cuts in favor of, rather than against, the government's exercise of regulatory power over the land to which it still holds title.

The *Locke* case, which Professor McGinley described, made this absolutely clear. The Court started out saying in its opinion upholding the FLPMA recordation requirement, clearly the government has the power to impose new regulatory constraints on the way vested property rights are used, and can condition their continued retention on the performance of certain affirmative duties.

Then it went on to say, and I would underline this, this ordinary power to qualify existing property rights is particularly broad with respect to the character of the property rights at issue here, namely, unpatented mining claims.

In short, mining claims are unusual property interests. But the very things that make them unusual strengthen rather than weaken the power of government to restrict their use in the public interest.

Now, in closing, I realize that Congress has historically been very sensitive to taking arguments, particularly in the context of mining claims. And Congress has throughout history been concerned to avoid any conceivable unfairness to holders of mining claims on Federal lands. .

It has exhibited what one commentator has called a striking reverence for such claims that has gone well beyond Constitutional requirements. It was such a sensitivity that led Congress 67, 68 years ago to exempt oil shale claims in the Mineral Leasing Act. .

But surely 68, or 78, or 88 years, as it would be under S. 2089, is long enough to wait for these claims to fulfill the purpose for which they were located, namely to promote the development of the mineral resources of the United States. .

With the benefit of 20/20 hindsight, it seems plain to me that the 1920 Congressional decision to exempt these claims in the Mineral Leasing Act was a mistake. It has clouded title and tied up large tracts of Federal lands, it has led to lengthy and unproductive litigation, and in the end has produced zero oil shale. .

We should learn from that unhappy history. The 1920 decision of Congress has allowed these claimants another two-thirds of a century to fulfill the purpose of the Mining Law. .

False or grossly exaggerated claims of takings of property rights should not deflect Congress from now setting the Mining Law back on its original course, by promptly enacting S. 2089. .

It represents, in my considered opinion, a fair, wholly reasonable, and fully Constitutional solution to a significant public lands problem. And I am confident it would, if it were challenged, be upheld in the courts. Thank you very much. .

[The prepared statement of Mr. Leshy follows:]

Statement of John D. Leshy
Before the
Subcommittee on Mineral Resources Development and Protection
# of the
Committee on Energy and Natural Resources
United States Senate
on S. 2089, concerning oil shale mining claims
April 22, 1988

Mr. Chairman, members of the Committee: My name is John D. Leshy. I have for eight years been Professor of Law at Arizona State University, where I teach, among other things, constitutional law and public land law. Prior to assuming my current post, I spent 3 1/2 years as Associate Solicitor for Energy and Resources in the Department of the Interior.

Today I will direct my remarks to possible constitutional issues involved in S. 2089. Let me say, first, that I have addressed the general question of Congress's power to affect the rights of holders of existing mining claims in a book I wrote about the Mining Law of 1872, entitled The Mining Law: A Study in Perpetual Motion, that was published a little over a year ago by Resources for the Future here in Washington. In discussing proposals to change the Mining Law, I recognized that, to be meaningful, reform proposals would have to address the 1.5

million or so mining claims currently found on the federal lands. Because holders of these claims could be expected to object to any new restrictions, one chapter of my book dealt with the constitutional and policy issues raised by applying new requirements to existing claims. That discussion is directly applicable to the objections being raised to S. 2089, so I have appended a copy of that chapter to this statement, and I request that it be included in the hearing record.

Three features of S. 2089 (and its House-passed counterpart, H. 1039) have been cited as posing possible constitutional problems:

(1) The elimination of the claimant's opportunity to obtain a patent on his claims (S. 2089, sec. 2; H. 1039, sec. 2(b));

(2) The requirement that the claimant (or, if the claimant chooses to convert the claim to a lease, the lessee) reclaim the land mined (S. 2089, sec. 4; H. 1039, sec. 2 (e)); and

(3) The requirement that the claimant/lessee diligently develop the claim/lease or face extinguishment of his rights (S. 2089, secs. 3 (b) and (c); H. 1039, sec. 2 (d)).

I believe that none of these features raises any serious constitutional questions. I will discuss each in turn.

A. Elimination of the Patent Option.

It is well-settled under the Mining Law that holders of oil shale mining claims have absolutely no constitutionally protected property rights in them unless the claims were valid (a) when the Mineral Leasing Act was adopted in 1920, and (b) today. The savings clause of the Mineral Leasing Act by its own terms protects only "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the [Mining Law]." 30 U.S.C. sec. 193. In plain terms, unless the claimant can show a discovery of valuable deposits of oil shale in 1920 and today, as well as compliance with the other requirements of the Mining Law, no question of a taking of a property right can arise, because there exists no property right to be taken.

Presuming these claims were valid in 1920 (and continue to be valid today), the claimants have had at least 67 years in which to apply for a patent. Their failure to make application before the February 5, 1987 cutoff date established by S. 2089 has been the result of their own voluntary choice. No constitutional principle of which I am aware requires the government to keep an offer once made open forever. To the contrary, it has always been recognized that the government has the right to respond to the passage of time and changed priorities by eliminating unperfected or future interests in property.

At bottom, takings questions turn on notions of fundamental fairness. S. 2089 poses no unfairness to these claimants. They have sat on their patent option for well over half a century, and Congress clearly has the constitutional power to say: "That is long enough." As Section 1 (5) of H. 1039 puts it: The holders of these claims "have been afforded ample opportunity to apply for patents."

Even if the claimants argue that they were discouraged from applying for patents after the early 1960's because the Department of the Interior then began to give stricter scrutiny to oil shale claims, the Department has always been willing to accept patent applications. Moreover, the government's more recent resolve to examine these claims more closely does not excuse the claimants' forty-plus year failure to apply for patents during the era when, by all accounts, the Department bent over backwards to be charitable to oil shale claimants, and actually issued patents to oil shale claims covering several hundred thousand acres of land.

The essential fairness of finally closing off the patent option is underscored by a closer examination of the Mining Law's patenting provision. Practically from the beginning, the patent has been regarded, by miners and the government alike, as a minor feature of the statute. It is a peripheral benefit, a frill - in constitutional takings parlance, a mere twig in the bundle of rights comprising potential property interests obtainable under the Mining Law. The Supreme Court noted in 1884 that the "patent adds little to the security of the party in continuous possession of a mine he has discovered or bought." Chambers v. Harrington, 111 U.S. 350, 353. As the Ninth Circuit Court of Appeals noted nearly a century later, "[a] miner never need acquire a title in order to work his claim . . .. Consequently . . . many miners never bother to seek patents." Alaska Miners v. Andrus, 662 F. 2d 577, 579 (9th Cir. 1981). Indeed, this has been the typical practice of legitimate miners for well over a century, and continues today. Spokesmen for the American Mining Congress told the Mining Subcommittee of the House Interior Committee last summer that many mines are currently being operated on unpatented claims; indeed, 300 million dollars was spent on the Henderson mine in Colorado without a patent being obtained. See Oversight Hearing on the Mining Law of 1872, June 23, 1987, Serial No. 100-6, pp. 404-05. In short, it is and always has been unnecessary to acquire a patent in order to develop a mining claim and bring a deposit into production.

Furthermore, the Mining Law is, as its very name demonstrates, concerned with mining - not homesites, ski areas, health spas, or other non-mineral pursuits. Although Congress decided long ago that holders of valid mining claims might (if they fulfilled all the requirements of the statute) obtain complete, fee simple title to the mineral and the surface of the land within their claims, at bottom the Mining Law, and the miners' rights under it, are designed to promote mineral development. As a unanimous Supreme Court put it in 1978, the Mining Law "surely was not intended to be a general real estate law," Andrus v. Charlestone

Stone Products Co., 436 U.S. 604, 611 (1978), and Congress is not obliged to sit on the sidelines and watch the Mining Law misused for purposes that have little or nothing to do with mining.

The legislation now before this Committee does not eliminate the core property right that exists in a valid mining claim -- the opportunity to mine. Its elimination of the peripheral gift of fee simple title to the land, available but not taken advantage of for 67 years, cannot under even the most imaginative stretching be considered a taking of the claimants' property rights.

For the same reason - that the opportunity to mine is not eliminated - S. 2089's requirement that the claimant elect between converting the claim to a lease or maintaining it as a claim raises no constitutional issue. Indeed, there is really no doubt that Congress could simply require all claims to be converted into leases. The form of the property right - whether claim, lease, permit, contract, or something else - is not constitutionally controlling; what counts is protecting its essence. In this case, the essence is an opportunity to mine.

As this Committee is aware, Congress has on several previous occasions done just what S. 2089 would do - restrict the rights of existing claimants to obtain patents to their claims. In only a couple of cases have constitutional challenges even been brought, and the courts have given them short shrift. In the most notable case, Freese v. United States, 639 F. 2d 754 (Ct. Cl. 1981), the Court of Claims said: "At best, [the claimant] has suffered a denial of the opportunity to obtain greater property than that which he owned [before Congress closed off the patenting option]. This cannot fairly be deemed the divestment of a property interest, save by the most overt bootstrapping." 639 F. 2d at 758. The U.S. Supreme Court declined to review this decision. 454 U.S. 827 (1981).

In another case, miners in Alaska unsuccessfully challenged a provision of the Alaska Native Claims Settlement Act that established a five year limit on the "possessory rights" of any existing "valid mining claim or location" on certain federal lands in that state. The federal court of appeals observed that mining claimants had no right to require the government "to hold open indefinitely the option to apply for a patent," and further that the land embraced within unpatented claims "remains subject to the disposing power of the Congress." Alaska Miners v. Andrus, 662 F. 2d 577, 579, 580 (9th Cir. 1981).

Case law and common sense thus unite. It is clearly constitutional for the Congress to eliminate the patent feature of the Mining Law for existing claimants.

B. The Requirement to Reclaim the Land.

In recent years Congress has frequently acted to require everyone, and not just users of federal lands, to conduct their activities in a way that ensures a healthy environment. Some of these laws, by necessity, have dictated drastic changes in the way companies do business, have sometimes seriously affected profit margins, and have resulted, in some cases, in certain activities or operations being forced to cease entirely. Yet this spate of pervasive regulation under such laws as the Clean Air and Clean Water Acts has never been thought to give rise to serious takings questions. It is a universally accepted general principle that, when society's fundamental interest in a healthy environment collides with private property interests, the latter must yield.

In this context, there can be no doubt about Congress's power to apply reasonable environmental regulations to existing mining claims. Congress has done so numerous times, by measures as old as an 1893 statute that effectively outlawed environmentally destructive hydraulic mining in the Sierra Nevada mountains in California (see my book, pp. 184-86), and as recent as the Clean Air and Clean Water Acts. Such regulation is concededly constitutional even though it can affect, sometimes greatly, a miner's ability to mine a claim. The Constitution allows Congress to demand, in other words, that miners use good housekeeping practices and repair the environmental damage they create.

There is nothing unusual or Draconian about S. 2089's reclamation requirement. It is not even novel, because the general command to reclaim mined land is implicit in the requirement adopted by the Congress in the Federal Land Policy and Management Act of 1976, 43 U.S.C. sec. 1732 (b), that all mining claimants avoid "unnecessary or undue degradation of the lands." See the BLM's implementing regulations, 43 C.F.R. secs. 3809.0-5 (j) and 3809.1-1 (1987). In fact, Congress has imposed much more detailed and stringent environmental requirements on all surface coal miners throughout the United States, whether operating on federal lands or not, yet a unanimous Supreme Court rejected the coal industry's argument that such restrictions unconstitutionally "took" the miner's property interest. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 295-97 (1981); Hodel v. Indiana, 452 U.S. 314, 333-35 (1981).

As with the elimination of the patenting feature, nothing in the reclamation requirement directly prohibits the opportunity to mine valid claims. Even where Congress flatly prohibits all mining on a claim, the courts will not assume that a taking requiring compensation has occurred. For example, Skaw v. United States, 740 F. 2d 932 (Fed. Cir. 1984), involved a congressional action far more extreme than that contemplated by the current proposals - an immediate, total ban on all mining on mining claims located in the bed of a river. Even there, the Court of Appeals could not conclude that a taking had occurred, and it remanded the case for a trial on the question. As this shows, a simple good housekeeping requirement that mined land be reclaimed falls far short of raising a serious constitutional question.

C. The Requirement that the Claimant/Lessee Diligently Develop the Claim/Lease or Forfeit It.

The constitutional attack on this provision is weakest of all. Insofar as S. 2089 increases the so-called "assessment work" requirement from the minimum of $100 (set in 1872 and never raised since) to $1000 per claim per year, it cannot possibly be argued that this is an unexpected, unwarranted infringement on the claimants' property rights. From the very beginning the statute has unequivocally set this figure as a floor, not a ceiling; that is, the statute has always required "not less than $100" worth of work each year (emphasis added). (Furthermore, the savings clause of the 1920 Mineral Leasing Act obligated the claimants to "maintain . . . [the claims] in compliance with the [Mining Law]." 30 U.S.C. sec. 193.) A congressional decision now to raise the floor (even apart from the fact that a tenfold increase merely accounts for some of the inflation that has occurred in the last 116 years) does no more than invoke a power that was reserved in 1872 and encumbered every mining claim located since.

Similar reasoning supports S. 2089's requirement that the claimant produce oil shale within 10 years in "significant marketable amounts" or forfeit the claim (sec. 3 (c) (3)), and the counterpart requirement that, if the claim is converted to a lease, the lessee produce oil shale in "commercial quantities" within 20 years or the lease expires (sec. 3 (b) (1)). It is true that these provisions change the practice of mining claimants being permitted, with executive branch acquiescence, to hold their claims indefinitely without producing valuable minerals. That practice mocks Congress's express purpose in enacting the Mining Law - "to Promote the Development of the mining Resources of the United States." 17 Stat. 91 (1982).

Surely it is within the power of Congress to give renewed meaning to that purpose by overcoming decades of lax administration, so long as the claimant is given a reasonable opportunity to comply. And surely twenty years (if the claim is converted to a lease) or ten years (if the claimant elects to maintain the claim rather than convert) is a reasonable opportunity. Once again, it is worth recalling that these claims are constitutionally protected property interests only if the claimants had already discovered valuable mineral deposits as of 1920, and therefore the claimants have already had many decades to bring them into production.

Enacted by Congress shortly after the Civil War, the Mining Law was based on the customs and practices of the early Western miners themselves, and in fact explicitly incorporated those customs and practices. See, e.g., 30 U.S.C. sec. 22. Those early miners would doubtless be shocked if they could see the current debate over whether mining claimants had the power to resist congressional efforts to bring claims into production or forfeit them. Those hardy souls, whose visions of El Dorado had brought them through many hardships, could not countenance a miner sitting on a discovery, or, as Justice Miller of the Supreme Court colorfully put it more than a century ago, "acting on the principle of the dog in the manger." Chambers v. Harrington, 111 U.S. 350, 353 (1884). All the miners' own rules centered on the principle of diligent development of a discovery. In a typical requirement, the "Jackass Gulch District" in Tuolumne County, California, decided in 1851 that five days unexcused absence from a claim forfeited it. The Georgetown Mining District nearby adopted rules in 1866 that required $500 worth of labor every two years to hold a claim. (For more details and sources, see my book at 108-09, and footnotes on pp. 414-15.)

The framers of the Mining Law were as serious as the miners themselves about the idea that mining claims were not to be held for speculative purposes, and that once a mineral deposit was discovered and a claim located, it should be developed promptly or forfeited. Thus, as I indicated, S. 2089 merely seeks to reinforce the purpose of the Mining Law - to bring valuable mineral deposits into production, or otherwise to free the lands for the use of others. In these circumstances, complaints of unfairness to the claimants ring hollow.

The Supreme Court has always recognized the power of government to condition the retention of a property right upon the performance of reasonable acts. Statutes of limitation, adverse possession, and so-called marketable title acts are based on that idea, and they are universal features of property law world-wide. Supreme Court decisions upholding these laws date back nearly to the framing of our Constitution. The most recent of these decisions occurred in the context of mineral rights, and thus is particularly instructive. In Texaco v. Short, 454 U.S. 516 (1984), the Court upheld an Indiana statute that extinguished private mineral interests that had laid dormant for twenty years. The statute was much harsher than the legislative proposal now before this Committee. The extinguishment of property interests it called for was practically immediate, and complete. Moreover, the mineral rights extinguished had not been obtained for free merely by location of tracts of federal lands, as here, but had instead been purchased for valuable consideration from the owners of the land. Finally, the mineral rights lost by operation of the statute did not, as would be the case here, revert to the government to be used for public purposes; instead, they were automatically transferred to the private surface owner from whom they had been purchased in the first place. Despite these severe and seemingly unfair consequences, the Court had no difficulty sustaining the statute.

Four Justices dissented, but only on the ground that the state had carried out this scheme without giving special notice to the affected property holders; otherwise, the dissenters agreed with the majority on the constitutionality of the law. S. 2089 would not trouble the dissenters in Texaco v. Short, because section 3(a) requires that the owner of each claim be given notice at least 150 days before the election must be made between maintaining the claim or converting to a lease. Furthermore, once the election is made, the claimant/lessee has an additional 10 or 20 years to bring the claim or lease into production.

D. Some Concluding Observations.

In sum, well-accepted principles of constitutional law make clear that S. 2089 does not raise any serious constitutional questions. Grasping at straws, the opponents of this legislation offer two other general arguments that can be easily dismissed. The first is that the Mining Law is different, and that whatever property interests might reside in existing mining claims have a special immunity from regulation that other, more ordinary property interests lack. It is true, as the Supreme Court has several times said, that unpatented mining claims are a "unique form of property." See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963). But their unique character (based largely on the fact that they are, until a patent is obtained, a mere possessory interest in federal land) cuts in favor of rather than against the government's exercise of broad supervisory powers over land to which it still holds title.

This was recently underscored in the Supreme Court's 1985 decision in United States v. Locke, 471 U.S. 84, upholding the recordation and annual filing requirements of the Federal Land Policy and Management Act. The Court began by observing that the government has the power, "with respect to vested property rights, . . . to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." Such new requirements pass constitutional muster if they are "reasonable" and "designed to further legitimate legislative objectives." Significantly, the Court went on to say that this ordinary power "to qualify existing property rights is particularly broad with respect to the 'character' of the property rights at issue here" - unpatented mining claims. Specifically, the United States retains "substantial regulatory power" over mining claims because, as holder of the underlying fee title, it "maintains broad powers over the terms and conditions upon which the public lands can be used . . . and acquired." 471 U.S. at 104 (emphasis added). (Although three Justices dissented, they did so solely on the ground that BLM had misconstrued the statute in question; that is, they did not contest the majority's view of Congress's power over unpatented mining claims.)

In short, mining claims are unusual property interests, but the very features that make them unusual strengthen rather than weaken the power of government to restrict their use in the public interest. As a representative of the American Mining Congress put it in a somewhat different context in testimony at last summer's House oversight hearing on the Mining Law, hardrock mineral resources "occupy a unique, but not preferred, position" among possible uses of federal lands. Oversight Hearings, supra, at p. 386.

The second general argument is that recently the Supreme Court has begun a revolutionary effort to give stricter scrutiny to takings claims, and therefore available precedents ought not to control how the Court would view legislation like S. 2089. The plain and simple truth is, however, not that plain or simple. The Court has decided more takings cases in the past decade than in the previous several decades. And a few recent decisions have established some modest new limits on governmental regulatory power in special circumstances. But it is nevertheless clear that no revolution is at hand. The Court has consistently (and usually unanimously) rejected takings challenges in circumstances like those involved here - where the regulation is reasonable and serves important governmental interests. The controlling decisions already discussed, Texaco v. Short, the Hodel cases, and United States v. Locke, were recent (and on the central questions, unanimous) decisions.

One other recent decision, Keystone Bituminous Coal Association v. DeBenedictus, 107 S. Ct. 1232 (1987), is worth mentioning because it involved mining regulation. In that case the majority upheld a Pennsylvania statute that prohibited underground coal mining in certain circumstances to protect against surface subsidence. Emphasizing the government's strong interest in "health, the environment, and . . . fiscal integrity," the Court came very close to overruling the most famous takings decision of them all, Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), which had struck down a very similar statute on takings grounds. Clearly if a takings revolution were at hand, Keystone would have followed and widened the scope of Justice Holmes' opinion in that earlier case. (Incidentally, Justice Powell dissented in Keystone, so his replacement by Justice Kennedy would not change the result.)

No recent Supreme Court decision has suggested that heightened scrutiny of takings claims is appropriate in the federal lands context. The only federal lands takings case it has decided in the past few years is the three year old Locke decision, discussed earlier, that involved mining claims, said strict scrutiny is inappropriate in that context, and thus is powerful support for the constitutionality of S. 2089. In short, there is absolutely no reason to believe that the constitutionality of S. 2089 or its House counterpart is in serious question.

I realize that Congress has historically been sensitive to takings arguments in the context of mining claims, and been concerned to avoid any conceivable unfairness to holders of mining claims on federal lands. It has, in other words, exhibited what Columbia Law Professor Peter Strauss once called a "striking reverence" for such claims that has gone well beyond constitutional requirements. See Strauss, Mining Claims on Public Lands, 1974 Utah L. Rev. 185, 213. It was such a sensitivity that led the 66th Congress to exempt oil shale claims from the Mineral Leasing Act enacted nearly seventy years ago. But surely 68 (or 78 or 88, as it would be under S. 2089) years is long enough to wait for these claims to fulfill the purpose for which they were located - to promote the development of the mineral resources of the United States.

With the benefit of 20/20 hindsight, it seems plain that the decision to exempt these claims from the Mineral Leasing Act was a mistake, one that has tied up large tracts of federal lands, led to lengthy and unproductive litigation, and in the end produced no oil shale. We should learn from that unhappy history. False or grossly exaggerated claims of takings of property rights should not deflect Congress from setting the Mining Law back on its original course by promptly enacting S. 2089. It represents, in my considered opinion, a fair, wholly reasonable and fully constitutional solution to the problem. I am confident it would, if challenged, be upheld in the courts.

The following is Chapter 15 from Leshy, The Mining Law: A Study in Perpetual Motion (Washington D.C., Resources for the Future, 1987):

15

Can Two Million Potential Property Interests on the Federal Lands Be Wrong?

Any major change in existing law will have to confront two million existing mining claims that have been recorded with the Bureau of Land Management.[1] These claims could theoretically cover up to 272 million acres of federal land,[2] although the actual amount is undoubtedly less. Determining how much less would require, however, the patience of Job and the longevity of Methusaleh.[3] Nevertheless, it is reasonable to assume that existing claims generally blanket known areas of substantial mineral potential, and thus are likely to contain most of the promising areas for future development. Indeed, industry spokespersons conceded that assumption decades ago.[4] Some existing claims are undoubtedly abusive, furnishing the cover for nonmineral occupancies. A substantial number of existing claims may be found in national parks, wilderness areas, and other areas now closed to the Mining Law or where its operation is highly restricted, such claims having been located before withdrawal or despite the restrictions. Their development would usually threaten the resources that led to the adoption of protective measures. For all of these reasons, the handling of existing claims is among the most important issues in any effort to fashion legislative reform.

Various reform proposals have treated the subject in different ways, with differing levels of detail. Going all the way back to the time before there was a federal mining law, the miners themselves had to face the problem of existing claims when they adopted new codes. Their solution tended, like the miners themselves, to be direct. When the miners in the Gold Hill mining district revised their code in 1860, for example, they simply decided that all claims under the previous code "shall become subject to the revised law after the expiration of three months."[5]

Shortly after adoption of the Mining Law, the first Public Land Commission recommended that existing claimants must apply for patent within one year of the day the claims were located or lose all rights.[6] In modern times recommendations for dealing with existing claims have been somewhat more charitable and, consequently, more complex. The 1949 Hoover Commission would have grandfathered existing claims, but encouraged the claimants to accept the new rules and regulations it recommended by waiving the annual assessment work requirement for those who agreed to do so.[7] The 1952 Paley Commission's recommendations concerning existing claims are less clear. It proposed increasing the annual assessment work requirement to $250, giving the Department of the Interior clear-cut authority to contest claims for failure to perform the required work, requiring federal recordation of existing claims, and invalidating claims more than ten years old for which no patent application had been made. It is not certain, however, whether the last requirement was intended to apply to existing or just to new claims.[8]

The majority recommendation of the Public Land Law Review Commission called upon Congress to establish a "fair notice procedure" to allow existing claimants "an option to perfect their claims under the revised location procedures" it recommended. These included, as noted earlier, pre-discovery protection, larger acreage limits, and other measures designed to better serve the interests of the modern prospector. The majority suggested that the availability of pre-discovery protection in particular should lead many existing claimants to convert to the new system, but apparently it would have left these claimants with the option of proceeding under existing law.[9]

The dissenters who advocated an all-leasing system did not address the problem of existing claims. Title II of Senator Henry Jackson's proposed public land organic act of 1971, which would have substituted a license-leasing system for the Mining Law, would have operated only prospectively, unless existing claimants agreed to substitute a license or lease for their "valid" claims. Absent such agreement, existing claims would have remained subject to existing law.[10] The American Mining Congress bill introduced by Congressman Aspinall and others in 1971 would have protected existing claimants as long as they applied for a patent within five years, or exercised a preference right to make a new location on the same lands under the new procedures.[11] The Department of the Interior's 1971 proposal would have required existing claimants to apply for a patent within four years, or present the secretary with "clear evidence" of the claim's validity, in order to maintain the claim under existing law.[12] Another reform bill of the early 1970s would have required all existing claimants to apply for patent within a brief period or forfeit all rights.[13] The Senate version of what became the Federal Land Policy and Management Act would have voided any existing claim upon which no application for patent had been made within ten years of recordation (recordation being required within two years of enactment), subject to certain limited exceptions.[14] This provision was dropped in conference because of House opposition, with scant explanation.[15] The Carter administration's leasing bill would have given existing claimants two years in which to file applications for an exploration license or lease under the new act, or a patent under the Mining Law. If they chose to file for a patent, but could not satisfy the discovery or other requirements of the Mining Law, their claims would disappear.[16]

The only legal constraint on Congress' power to deal with this problem is constitutional; valid existing claims (those that can show a discovery and compliance with other provisions of existing law) are property interests protected by the fifth amendment against extinguishment without due process or compensation.[17] This bears some elaboration. Although it is frequently heard that the constitutional protection extends to all mining claims, it is quite clear today that the only mining claims that embrace a constitutionally protected compensable property interest are those upon which a discovery has been made and maintained, and for which the other requirements of the Mining Law have been met. Before patent the locator's interest is, as the Supreme Court said in 1896, "nothing more than a right to . . . possession . . . based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim."[18]

The Supreme Court has also said, on occasion, that unpatented mining claims "are property in the fullest sense of the word . . . [and] may be sold, transfered, mortgaged, and inherited."[19] But the context of this often-quoted remark should not be ignored. That case held that a state could tax the unpatented mining claim. The claimant had a large investment in the claim, and the existence of a discovery was not questioned. Because this decision was rendered at a time when the Supreme Court still regarded discovery of a mineral deposit as a precondition for locating a claim—that is, because all located claims legally had to have a discovery—it was easy for the Court to speak of mining claims as property without qualification. But once the Court had blessed the practice of locating claims without discovery, it had to, and did, retreat and qualify its pronouncements. Its modern view is, then, that a mining claim is a "unique form of property," which is "valid against the United States [only] if there has been a discovery of mineral, and if other statutory requirements have been met." Thus a locator who does not carry his claims to patent "take[s] the risk that his claim will no longer support issuance of a patent"; in other words, his property interest may disappear without compensation.[20] The vast majority of existing mining claims undoubtedly fall in this category of those for which compensation is not required because of the absence of discovery.

Even those relatively few claims that embody a valid property interest are not immune from regulation. Private property interests may be regulated through exercise of government's police power in order to serve the common good, and even a substantial diminution in value may not constitute a taking for which compensation is owed. The teaching of modern "takings" cases is that private property interests must yield to appropriate governmental regulation, and only outright extinguishment, physical invasion, or relatively extreme curtailment of legitimate investment-backed expectations raise serious "takings" questions.[21] When considered in the specific context of Congress's power over the public lands under the property clause of the Constitution (a power routinely described by the Supreme Court for more than a century as "without limitations"[22]), Congress's power to regulate mining claims on federal lands—even those claims that are perfected by discovery and maintained in compliance with the Law, and are thus valid property interests—cannot be seriously questioned.

Although, as one commentator has said, the courts "have never been able to develop [a takings] standard more meaningful than balancing the public need against the private cost,"[23] in recent years the federal courts have resolved numerous collisions between private property and public regulation in the context of mineral rights. In *Texaco v. Short*, for example, the Supreme Court upheld an Indiana statute extinguishing outright any severed mineral interest that had gone unused for twenty years, unless the owner filed a statement of claim with a designated governmental official within two years of enactment. Citing a long line of precedents, the Court held that the government "has the power to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a present intention to retain that interest."[24]

More precisely on point, the Supreme Court in April 1985 upheld the mining claim recordation provisions of the Federal Land Policy and Management Act (FLPMA) against challenges that they constitute a taking of claimants' property interests without due process. This decision, *United States v. Madison D. Locke,*[25] merits some discussion because it presented, from the viewpoint of those challenging the constitutionality of the recordation, the best conceivable fact situation. The claimants had purchased ten unpatented sand and gravel claims in the 1960s, and operated a gravel and building material quarry there ever since. They had faithfully complied with applicable laws, including FLPMA's recordation provision, through 1979. At the end of 1980, however, they filed the annual statement required by the act one day late, on December 31. (The statute, in a bizarre but unequivocal twist, required the statement to be filed "prior to December 31 of each year.") The act provides—also unequivocally—that failure to file as required "shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner."[26]

In most cases this would not have been a problem; the claims could have been relocated and re-recorded. But these claims were apparently for ordinary gravel and building stone, and had been initially located before Congress's prospective withdrawal of these minerals from the Mining Law in 1955. Therefore, relocation was not possible and the quarry could only be reacquired by purchase if the federal government had been willing to sell.

The facts, then, cried out for relief: there had been a purely technical (and rather understandable) failure to comply with a statute that was aimed elsewhere—at spurious and abandoned claims, not at active mining operations. Yet arrayed against the claimants was a panoply of venerable authorities upholding the constitutionality of statutes of limitations, recording acts, and similar devices, in circumstances equally harsh. In the end, therefore, the claimants' argument had to be that there was something different about the Mining Law, and mining claims located under it, that deserved special consideration.

The Supreme Court firmly rejected this plea in upholding the Federal Land Policy and Management Act. Mining claims are a "unique form of property," the majority agreed in *Locke,* but that uniqueness cut against, not toward, the claimants. The government retains "substantial regulatory power" over mining claims because, as owner of the underlying fee title, it "maintains broad powers over the terms and conditions upon which the public lands can be used . . . and acquired." The recordation requirement was a "reasonable, if severe, means of furthering [the legitimate legislative] goals" of ridding the federal lands of stale mining claims and providing for centralized, up-to-date information on all claims. It was the claimants, not Congress, that caused the loss of property because it was their failure to file in compliance with these reasonable regulatory restrictions.

Three Justices dissented, but their dissents were narrow, based primarily on the unusual and confusing statutory deadline. Specifically, the dissenters did not in general quarrel with the proposition that Congress had substantial regulatory power over unpatented claims. The *Locke* decision, then, is powerful support for the authority of Congress to take reasonable steps, as the majority put it, "to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life." Mining claims may be peculiar property interests, but their special character enhances rather than limits the supervisory power of government.

Occasionally, when altering the management regime for certain federal lands, Congress has established explicit procedures dealing with existing mining claims. The Multiple Mineral Development Act of 1954, for example, broke an impasse over conflicts between locatable and leasable minerals by authorizing lease applicants to initiate a determination of the validity of pre-existing mining claims in order to secure rights to the leasable minerals on the claimed land. In the Surface Resources Act of 1955, a statutory procedure was created to allow the United States to establish its rights to use the nonmineral, surface resources of pre-existing, unpatented mining claims.[27]

Both acts have been aptly described as reflecting a "striking reverence" for existing mining claims.[28] They provide rather elaborate procedural protections intended to give mining claimants an opportunity to challenge government restriction of their rights in their claims. These restrictions were designed to allow persons other than the mining claimant either to extract leasable minerals found on the claims (Multiple Mineral Development Act) or to use the surface resources found on the claims (Surface Resources Act).

Despite the cumbersome procedures of the Surface Resources Act, the Forest Service made a determined effort to establish its right to manage the surface resources of existing mining claims on national forest land. After ten years the agency had reviewed 115 million acres and established its management right to the surface resources of approximately 850,000 pre-existing claims. Ultimately, the agency established surface management rights on all but about 2,000 claims.[29]

In a few situations Congress has gone beyond these moderate restrictions to place an absolute time limitation of the assertion of rights on existing claims. For example, a small part of the complicated legislative settlement of the land claims of Alaskan natives addressed the problem of existing mining claims in areas selected by Alaskan native corporations chartered by the act. The Alaska Native Claims Settlement Act provided that "possessory rights" in any existing "valid mining claim or location" on such lands shall be protected for only five years. This litigation was challenged by owners of unpatented claims, but a federal court of appeals rejected the attack out of hand in *Alaska Miners v. Andrus*. It found that holders of unpatented claims have no right to require the government "to hold open indefinitely the option to apply for a patent." Furthermore, it said, the land embraced in an unpatented claim "remains subject to the disposing power of Congress" until the conditions imposed by law for issuance of a patent are satisfied.[30]

Congress included similar procedural limitations in the Mining in the Parks Act. This statute requires, first, that all existing mining claims within the national park system be registered; and second, that the secretary of the interior proceed to determine their validity. The experience in implementing this act demonstrates the stale and otherwise invalid character of most unpatented mining claims. In Death Valley National Monument, for example, of the approximately 50,000 unpatented claims estimated to exist in 1976, 863 were recorded with the government. Of the 486 reviewed by May 1981, only 44 were deemed valid. In other affected areas of the national parks system, only 1 of 179 claims reviewed was held valid. Neither these reviews nor the statute itself have been challenged in court.[31] In another review, completed before the Mining in the Parks Act, the Bureau of Land Management found no mining claims valid out of nearly 5,000 it studied in Canyonlands National Park. The bureau subsequently issued nearly 4,000 complaints, to which only twenty-four claimants, asserting interests in 345 claims, even responded.[32]

In enacting the Mineral Leasing Act in 1920, Congress protected valid existing mining claims previously located for minerals the act made leasable, so long as they were "maintained" in compliance with previous law. Congress also gave claimants the opportunity to convert "valid" oil shale claims to leases under certain circumstances.[33] There are other instances where Congress has authorized the conversion of valid existing mining claims into leases. The Combined Hydrocarbon Leasing Act of 1981 authorizes, but apparently does not require, holders of existing valid claims to convert them to combined hydrocarbon leases.[34] The conversion of mining claims to geothermal leases is authorized under the Geothermal Steam Act of 1970, upon a showing that the applicant has made "substantial expenditures for the exploration, development or production of geothermal steam."[35]

More recently, the State of Utah ran into the existing mining claim problem in developing Project BOLD, its proposal for large-scale exchanges of scattered state lands for larger, more manageable blocs of federal lands. Like nearly all other states, Utah has a permit-leasing system for hardrock mineral development on its state lands. The question is how to treat existing mining claims on those federal lands Utah would acquire in the exchange.

The state's initial proposal would have required holders of existing mining claims on the exchanged federal lands to complete discovery work and submit evidence of a valuable discovery (and of compliance with assessment work requirements) within four years, or convert the mining claim to a state preference-right lease. The lease would have a minimum tenure of ten years. If the claimant persuaded the state that a discovery had been made in that four-year period, the state would follow federal law and issue the claimant a patent. The state would then obtain the right to select equivalent federal mineral acreage elsewhere.[36]

This proposal went well beyond merely honoring valid existing rights on the exchanged lands, for it would have given the claimant four additional years to make a discovery and thus obtain a valid right. If the federal land had instead been withdrawn from the Mining Law subject to valid existing rights, the claimant would have had to show a discovery as of the date of the withdrawal, not within some period of time thereafter. Furthermore, the initial Utah proposal would not have restricted the claimant's right to secure a patent to the land under the Mining Law. It would have prevented the location of new claims, however, and discontinued the practice of federal agencies of allowing unpatented claims to exist indefinitely without either development or patent application.

Although there is little doubt about the constitutionality of this approach in the wake of the court decisions discussed earlier, the Utah Mining Association protested to the state in June 1983 that the proposal would "take property rights of mining claimants without just compensation." The miners recommended, as an alternative, grandfathering existing mining claims wholesale and giving the state the right to select lands elsewhere. To satisfy the miners, the state eventually agreed to support a proposal to recognize valid existing claims on transferred lands, though such claims would now be subject to state administration. Some mining claimants, however, had earlier agreed to convert their claims to state leases once the state assumed control of the land.[37]

Despite the miners' "property rights" rhetoric, it is plain that Congress may require holders of valid existing claims to convert them to leases or otherwise conform them to the provisions of a reformed hardrock leasing system. If a reasonable period of time is allowed for conversion and the property interest in valid existing claims is not wholly extinguished (even though it may be made subject to substantial new regulation), the constitutionality of such a procedure seems assured.[38]

The policy reasons for requiring conversion are compelling. An important goal of any reform of the Mining Law should be to eliminate the uncertainty and high transaction costs that currently plague genuine mineral developers who seek to assemble secure interests in logical targets for exploration and development. A wholesale grandfathering of existing claims would, in many if not most areas of mineral interest, entirely defeat that objective. The experience with wholesale grandfathering of oil shale claims under the Mineral Leasing Act—a legacy of lengthy, costly litigation that has probably retarded rather than advanced actual development of oil shale—bears stark witness to this result.[39] Moreover, wholesale grandfathering would perpetuate the toleration of abuses of the Mining Law for nonmining purposes. Even if only existing valid claims were grandfathered, spurious claims would most likely be eliminated only through a lengthy and costly process of case-by-case adjudication. This is not to say that existing claims do not deserve careful treatment, both to provide fairness to those who actually have genuine claims and to otherwise comport with constitutional requirements. But reform of the Mining Law that operates only prospectively would be more cosmetic than real, serving mostly to perpetuate rather than solve the difficulties with the existing Law.

The problem of existing claims will not be easy to resolve politically. Existing claimants may have wildly exaggerated views of the validity and value of their claims, and differences in estimated value can span several orders of magnitude.[40] Some defenders of the Mining Law have predicted extreme difficulties in the event of change, foreseeing a "veritable flood of litigation."[41] Ironically, environmentalists advocating strict limits on the protection to be afforded existing claims might be joined by small-scale prospectors. These modern descendants of early prospectors still attack the major companies for abusing the Mining Law by holding many claims without genuine compliance with the *pedis possessio,* discovery, and assessment work requirements.[42]

It is always difficult to curtail existing expectations through the legislative process, and the fervor of mining claimants tends to be pronounced. Other direct experience besides Project BOLD teaches that the political problems raised by existing claims can be major. Robert Swenson's review of the legislative history of the Mineral Leasing Act of 1920 led him to conclude that attempts to formulate a politically acceptable policy toward existing mining claims were responsible for delaying passage of that statute for a decade.[43] But his observation, made before decisions like *Texaco v. Short* and *United States v. Locke,* is even more valid today: "[d]rafted carefully, there should be no serious constitutional problem" in devising an effective way to rid the federal lands of spurious, abandoned, or otherwise unperfected claims.[44] Legitimate, valid claims can be converted to leases; all others can be extinguished.

Even if Congress does not act, the executive branch does not lack authority to minimize abuses and clear title to federal lands. There are some intriguing opportunities for the executive to adopt a more aggressive posture and, in effect, to continue the steady process of making Mining Law administration more consonant with the modern imperatives. Consider, for example, existing mining claims in areas of federal land that have been withdrawn or reserved for other uses, subject to valid existing rights. In many situations the federal government does not review the validity of existing claims even after the land has been withdrawn. Peter Strauss has convincingly documented how, when such claims have been examined, the Department of the Interior has historically bent over backwards to provide claimants with every conceivable procedural protection. It has spent enormous amounts of time and money combing local courthouse records, in a "grinding and largely futile exercise," in order to identify mining claimants and give them full opportunity to prove their claims. Regardless of whether this practice should be ascribed to what Strauss calls the historic "tenderness" and "overprotectiveness" of the federal agencies toward mining interests, to a bureaucratic instinct in the relevant offices in the Department of the Interior to enlarge their budget and staff, or to an exaggerated notion of the fair notice requirement of constitutional due process, Strauss rightly concludes that it is both bad policy and bad law.[45] The department itself has reported that the administrative cost of clearing invalid mining claims from federal land often exceeds the market value of the land.[46] Cases decided since Strauss's analysis only underscore the extravagance of the agency's practice.

Strauss has offered a number of suggestions for simplifying and otherwise streamlining the executive's handling of unpatented mining claims without violating the elementary notions of fairness embodied in the due process clause. One of these, federal recordation, was finally adopted by Congress in 1976; but others—such as placing the initial burden on the claimant to prove claim validity, and giving the department authority to engage in pre-hearing investigations of the claimant's position—have not been adopted.

The case for assigning to the claimant the burden of presenting a strong *prima facie* showing for the validity of a mining claim is particularly compelling, given the onslaught of environmental regulatory laws in the past few years. We have seen how these laws have often added substantial costs to the conduct of mining operations. These costs, in turn, raise the threshold of prudence in the behavior of the prudent person, and call further into question the marketability of many claimed deposits. Thus to meet either of these discovery standards a fresh, contemporary look at the validity of claims is plainly needed before a discovery can be validated. The imposition of these new regulatory costs should be sufficient, in other words, to place the burden of going forward, as well as the ultimate burden of proof, on the claimant. This would be particularly appropriate for claims where production is not now occurring, and should be compelling for claims where production has never occurred.

Writing in 1974, Strauss made a sound case for the proposition that the Interior Department could adopt reforms like this under its existing rulemaking and management powers, without additional authority from Congress.[47] The Federal Land Policy and Management Act's recordation requirement and its general mandate to prevent unnecessary or undue degradation of the public lands provide additional support. There is no sound reason for the executive not to streamline the process of testing the validity of existing claims. New general regulations concerning claim contests could be adopted. Special, more limited rules could be devised for withdrawn areas, where the question of valid existing rights is at issue, thus greatly assisting the government in pinpointing and possibly acquiring inholdings, and otherwise carrying out the purposes of the withdrawal. The advantages of such streamlining, in terms of efficiency, would be pronounced; the risks of unfairness would be slight. The present practice serves almost no societal interest, except to provide employment to those who must investigate, initiate, and, occasionally, defend claim contests. Most particularly, it does little to advance the nation's interest either in developing federal minerals or in managing federal lands for other uses. This is, in short, a worthy cause for modern reformers concerned with promoting efficiency in government.

But it may be too much to hope for an aggressive stance from the Interior Department, for most indications are that passiveness remains the rule. In one recent case, Interior's Board of Land Appeals allowed a claimant to rely on "unconventional" processing techniques in order to prove a discovery, even though the operation was in Death Valley National Monument. In another case, the board examined the Federal Land Policy and Management Act's special requirement that mining claims in the California Desert Conservation Area be subject to "reasonable regulations . . . to protect the scenic, scientific and environmental values" of the area. Although such regulations were to be incorporated into mining patents, the board decided not to apply them to claims that had been "perfected," though not patented, before FLPMA, because they were considered "valid existing rights."[48] Such reluctance to disturb claimants' expectations, no matter how tenuous, fails to take advantage of the substantial constitutional leeway the agency posseses. The problem of existing claims remains essentially a political one, and deeply engrained reverence for such claims will be hard to dislodge.

Chapter 15

1. Comptroller General of the United States, General Accounting Office, *Interior Should Ensure Against Abuses from Hardrock Mining,* no. GAO/RCED-86-48 (Washington, D.C., Government Printing Office, 1986) p. 10.

2. This assumes that all existing recorded claims are association placer claims of maximum size (160 acres), and that there is no overlap. Both assumptions are patently false, of course. No one claims that the actual acreage covered is anywhere near this high.

3. The BLM's compilation of mining claims offers no easy way to calculate the total acreage subject to claims, because it does not locate them on the ground and thus does not indicate overlap.

4. See *Development of Mineral Resources of the Public Lands of the United States,* Hearings before a subcommittee of the Senate Committee on Public Lands and Surveys, 77 Cong. 1 sess. (1941) pt. 1, p. 196 (testimony of D. F. Hewett of the U.S. Geological Survey) ("Even extremely low-grade deposits . . . are commonly claimed, partly because of the inherent optimistic belief of the prospector that richer material must be close at hand, and partly on the sounder basis that future improvements in technical processes or lowering of standards by consumers may some day make the deposit of value"); pp. 240–241 (testimony of R. R. Sayers, Director of the Bureau of Mines) ("The public land has been pretty thoroughly prospected and virtually all exposed or easily found deposits of any possible commercial value have been located under the mining laws or otherwise acquired by private owners"); p. 605 (statement of Robert S. Palmer of the Colorado Mining Association) ("In every instance, within my experience, an ore body of the first magnitude had been known for many years before it was successfully worked"); p. 654 (statement of Joe T. Juhan) ("[T]he strategic metals do not have to be found, as they have already been discovered by the prospectors in the years gone by").

5. Rules of the Gold Hill Mining District, Storey County, Nevada, section 17 (March 4, 1860), as reported in Clarence King, comp., *The United States Mining Laws and Regulations Thereunder . . . ,* vol. 14 of *Tenth Decennial Census: 1880* and reproduced in *Dips, Angles & Spurs* vol. 4, no. 2 (April 1, 1984) p. 11.

6. *Report of the Public Land Commission* (Washington, D.C., Government Printing Office, 1880); discussed in Irving Senzel, *Revision of the Mining Law of 1872,* Committee Print 95-11, Senate Committee on Energy and Natural Resources, 95 Cong. 1 sess. (1977) p. 25.

7. Commission on Organization of the Executive Branch of the Government, *Task Force Report on Natural Resources* (Washington, D.C., Government Printing Office, 1949) appendix L, p. 55.

8. President's Materials Policy Commission, *Resources For Freedom,* vol. 1 (Washington, D.C., Government Printing Office, 1952) p. 32.

9. Public Land Law Review Commission, *One Third of the Nation's Land* (Washington, D.C., Government Printing Office, 1970) p. 130.

10. S. 921, 92 Cong. 1 sess. (1971), section 211(b), reprinted in *Legislative History of the Federal Land Policy and Management Act of 1976* (FLPMA), Committee Print 99, Senate Committee on Energy and Natural Resources, 95 Cong. 2 sess. (1978) p. 1148.

11. "Mineral Development Act of 1971," H.R. 10640, 92 Cong. 1 sess. (1971); described in Senzel, *Revision of the Mining Law*, pp. 32–35.

12. H.R. 11527, S. 2727, 92 Cong. 1 sess. (1971); described in Senzel, *Revision of the Mining Law*, pp. 36–38.

13. S. 1040, 93 Cong. 1 sess., section 123(d) (1973).

14. S. 507, section 311(b), discussed in *National Resources Lands Management Act*, S. Rept. 583, 94 Cong. 1 sess. (1975) pp. 12, 64–66. On the floor, Senator McClure introduced an amendment to delete the provision, but after debate withdrew his amendment. *Congressional Record* vol. 122, pt. 4, 94 Cong. 2 sess. (1976) pp. 4052–4053. These materials are found in *Legislative History of FLPMA*, pp. 77, 129–131, 201–202.

15. The conference committee merely explained that the "more specific House amendments" providing for "extinguishment of abandoned claims" were adopted instead. H. Rept. 1724, 94 Cong. 2 sess. (1976) p. 62; *Legislative History of FLPMA*, p. 932. The explanation was in reference to the recordation requirements of section 314 of FLPMA. *Statutes at Large*, vol. 90, pp. 2769–2770 (1976); *United States Code*, vol. 30, section 1744.

16. H. R. 9292, 95 Cong. I sess. (1977) section 130. See also Hearings on H. R. 5831 and H. R. 9292 before the Subcommittee on Mines and Mining, House Committee on Interior and Insular Affairs, 95 Cong. I sess. (1977) pp. 105–106.

17. *St. Louis Mining and Milling Co. v. Montana Ltd.*, 171 U.S. 650, 655 (1898) ("[W]here there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. . . . ").

18. *Black v. Elkhorn Mining Co.*, 163 U.S. 445, 450 (1896).

19. *Forbes v. Gracey*, 94 U.S. 762, 767 (1877).

20. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335–336 (1963).

21. See, for example, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); Joseph Sax, "Takings, Private Property and Public Rights," *Yale Law Journal* vol. 81, no. 2 (1971) pp. 149–186; Sax, "Takings and the Police Power," *Yale Law Journal* vol. 74, no. 1 (1964) pp. 36–76; Sax, "Some Thoughts on the Decline of Private Property," *Washington Law Review* vol. 58, no. 3 (1983) pp. 480–496.

22. See, for example, *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. City & County of San Francisco*, 310 U.S. 16, 29–30 (1940); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

23. A. Dunham, "Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law," in P. Kurland, ed., *The Supreme Court Review–1962* (Chicago, University of Chicago Press, 1962) pp. 63–106 at 76.

24. *Texaco v. Short*, 454 U.S. 516, 526 (1982). The primary attack on the Indiana statute was that it failed to provide adequate notice of extinguishment, because the state did not undertake to notify individually all owners of severed mineral interests that were subject to forfeiture. The majority upheld the statute despite lack of individual notice, and while there was a vigorous dissent by four Justices on this question, even the dissenters conceded that the state had a legitimate interest in regulating, and that extinguishment of the property interest was constitutional so long as adequate notice was provided. 454 U.S. at 551–552 (Brennan, J.). See also *Schroeder v. City of New York*, 371 U.S. 208, 211–214 (1962); Note, "Constitutionality of Marketable Title Legislation," *Iowa Law Review* vol. 47 (1962) pp. 413, 418–423; Peter Strauss, "Mining Claims on Public Lands," *Utah Law Review* vol. 1974, pp. 185, 196–201, 214–224.

25. *United States v. Madison D. Locke*, 471 U.S. , 105 S.Ct. 1785 (1985). For other decisions upholding the recordation provisions, see *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981); *cert. denied*, 454 U.S. 1031 (1981); *Topaz Beryllium Co. v. United States*, 479 F. Supp. 309 (D. Utah 1979); *aff'd* 649 F.2d 775 (10th Cir. 1981).

26. *Statutes at Large*, vol. 90, p. 2769 (1976); *United States Code*, vol. 43, section 1744.

27. *Statutes at Large*, vol. 68, pp. 708–717 (1954); *United States Code*, vol. 30, sections 521–531; *Statutes at Large*, vol. 69, pp. 367–372 (1955); *United States Code*, vol. 30, sections 611–615. For a description of these acts and experiences under them, see Rocky Mountain Mineral Law Foundation, *The American Law of Mining*, vol. 1 (1st ed., New York, Matthew Bender, 1983) sections 1.39–1.42, pp. 110–120 (Multiple Mineral Development Act); section 1.44, pp. 121–124 (Surface Resources Act).

28. Strauss, "Mining Claims on Public Lands," p. 213.

29. J. C. Dotson, ed., *Symposium on American Mineral Law* (Tucson, University of Arizona College of Mines, 1966) p. 266 (statement of R. G. Florance, U.S. Forest Service). Peter Strauss reports slightly different figures. "Mining Claims on Public Lands," p. 215.

30. *Statutes at Large*, vol. 85, pp. 688, 714 (1971); *United States Code*, vol. 43, section 1621(c); *Alaska Miners v. Andrus*, 662 F.2d 577, 579–580 (9th Cir. 1981). For two other recent decisions going in somewhat different directions on Congress's power to restrict a claimant's possessory interest, compare *Freese v. United States*, 639 F.2d 754 (Ct.Cl), *cert. denied*, 454 U.S. 827 (1981) (Congress may constitutionally extinguish a claimant's right to patent under the Mining Law), with *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984) (congressional action prohibiting dredge or placer mining in the bed of a designated Wild and Scenic River may constitute a taking of a mining claimant's property requiring compensation; remanded for trial on whether a taking had occurred).

31. *Statutes at Large*, vol. 90, pp. 1342–1344 (1976); *United States Code*, vol. 16, sections 1902–1912; Comptroller General of the United States, General Accounting Office, *Mining on National Park Service Lands—What Is At Stake?* No.

EMD-81-119 (Washington, D.C., Government Printing Office, 1981) p. 13. See also Eva Novak, "Mining and the National Park System," *Journal of Energy Law and Policy* vol. 2, no. 2 (1982) pp. 165, 172–173, n. 46.

32. See Strauss, "Mining Claims on Public Lands," pp. 218–219.

33. *Statutes at Large*, vol. 41, p. 445, 451 (1920); *United States Code*, vol. 30, sections 193, 241.

34. *Statutes at Large*, vol. 95, pp. 1070–1071 (1981); *United States Code*, vol. 30, section 226(K)(1). The statute requires the claims to be valid, but it also provides that an existing claim will not be deemed invalid "solely because it was located as a placer location rather than a lode location or vice versa, notwithstanding any previous adjudication on that issue." It also requires the application for conversion to be accompanied by an "acceptable plan of operations which assures reasonable protection of the environment." Ibid. Because conversion is optional, no judicial challenge is likely. See also *Statutes at Large*, vol. 74, p. 790 (1960); *United States Code*, vol. 30, section 241(b), which authorizes the conversion of hydrocarbon mining claims to oil shale mineral leases.

35. *Statutes at Large*, vol. 84, p. 1566 (1970); *United States Code*, vol. 30, section 1003. Apparently no showing of the validity of the mining claim is necessary prior to conversion. See *Getty Oil Co. v. Andrus*, 607 F.2d 253 (9th Cir. 1977); H. Rept. 1544, 91 Cong. 2 sess. (1970); *Code of Federal Regulations*, vol 43, section 3220 (1983).

36. Utah Department of Natural Resources and Energy, *Project BOLD: Alternatives for Utah Land Consolidation and Exchange* (Salt Lake City, State of Utah, September 1982) pp. 59–75.

37. See S. 2949 and H. R. 6197, 98 Cong., 2 sess. (1984); *Public Lands News* vol. 8, no. 13 (June 23, 1983) p. 6; vol. 8, no. 21 (October 27, 1983) p. 8. See also letter from Gulf Mineral Resources to Project BOLD office, December 8, 1982 (expressing agreement to relinquish title to unpatented mining claim in exchange for state lease).

38. Although the majority in *Texaco v. Short* held that written notice to individual claimants is unnecessary (454 U.S. 516, 530–538), such notice is relatively easily provided now that claims must be recorded and updated annually with the Bureau of Land Management.

39. See, for example, *Andrus v. Shell Oil Corp.*, 446 U.S. 657 (1980); *United States v. Catlin Bohme*, 87 I.D. 284, 87 I.D. 535 (1980); *Tosco Corp. v. Hodel*, 611 F. Supp. 1130 (D. Colo. 1985). See also Strauss, "Mining Claims on Public Lands," pp. 217–218.

40. See Comptroller General of the United States, "Mining on National Park Service Lands," p. 27, which sets out estimated acquisition costs for groups of mining claims in Death Valley National Monument, which were variously prepared by the National Park Service (NPS), an NPS consultant, and the claim owners' consultant. The estimates on identical groups of claims vary tremendously; claims the NPS values at $2 million or less are valued by others at $24–$54 million. The

NPS estimated total acquisition costs of $46 million; the claim owners estimated the cost at nearly $400 million. In Glacier Bay National Monument, twenty patented claims were estimated by the NPS to have only nominal value, while the Bureau of Mines estimated their value at $300 million. Ibid., pp. 28–29.

41. See, for example, J. L. Neff, "The Miners Law," *Idaho Law Review* vol. 19, no. 3 (1983) p. 606.

42. See, for example, M. Powers, "The Fight for Our Mining Rights," *Gold Prospector* vol. 9, no. 1 (April 1983) pp. 30, 60 ("an Anaconda, an Exxon, a Humble Oil and those with their ten thousand illegally held claims which they only work a small part of, is not the right side of the coin").

43. Robert Swenson, "Of Mountains and Mice," *Land and Water Law Review* vol. 6, no. 1 (1970) p. 140.

44. Ibid., p. 145.

45. Strauss, "Mining Claims on Public Lands," pp. 224, 243; see also pp. 186–271.

46. U.S. Department of the Interior, *Report to the Public Land Law Review Commission* (Washington, D.C., 1968) pp. 44–45. For further discussion of this cost in the context of oil shale, see Comptroller General of the United States, General Accounting Office, *Modernization of 1872 Mining Law Needed to Encourage Domestic Mineral Production, Protect the Environment, and Improve Public Land Management*, no. B-118678 (Washington, D.C., Government Printing Office, 1974) p. 20 ("[T]ime consuming and costly actions [are] needed to identify and clear the titles to dormant mining claims"). One commentator recently estimated that under existing policies it would cost the federal treasury between 130 and 260 million dollars to clear the government's title of the invalid mining claims that have been recorded to date. Michael Braunstein, "Natural Environments and Natural Resources: an Economic Analysis and New Interpretation of the General Mining Law," *U.C.L.A. Law Review* vol. 32, no. 6 (1985) pp. 1155–1156.

47. Strauss, "Mining Claims on Public Lands," pp. 200–201, 223, 231, 233, 237, 247, 249–251.

48. *United States v. Carl Dresselhaus*, 81 IBLA 252 no. 82-88 June 8 (1984); *California Portland Cement Co.*, 83 IBLA 11 (1984), construing section 601(f) of FLPMA, *Statutes at Large*, vol. 90, p. 2784 (1976) and *United States Code* vol. 43, section 1781(f).

Senator MELCHER. Thank you. And now we will hear from Kathleen Zimmerman, Public Lands Division, National Wildlife Federation.

STATEMENT OF KATHLEEN C. ZIMMERMAN, COUNSEL, PUBLIC LANDS AND ENERGY DIVISION, NATIONAL WILDLIFE FEDERATION

Ms. ZIMMERMAN. Given the hour, I will be very brief, and limit my remarks to just reiterate two points.

First, with respect to the patenting limitation of the bill. Opponents of this legislation would have the subcommittee believe that it is embarking on some radical, uncharted course of action, and this simply is not true.

Congress has on numerous occasions enacted legislation affecting the interests of mining claimants. For example, the Wilderness Preservation System Act, as well as several statutes enacting national recreation areas, preclude the issuance of patents on existing mining claims.

The Federal courts that have reviewed these statutes, both the United States Court of Claims and the Court of Appeals, have consistently found them to be Constitutional. The proposed bill merely follows this well-established precedent.

Second, with respect to the diligence requirements of the bill, it must be remembered that legislatures have substantial power under the Constitution to regulate the use of private property.

The classic example of this power is land use zoning, but it is not limited to zoning. Congress will surely not exceed its Constitutional powers by enacting legislation intended to ensure the diligent and sound development of this Nation's energy mineral resources held by oil shale claimants. After all, the original purpose of the Mining Law was to encourage mineral development.

Moreover, the Mining Law itself, as pointed out by Professor Leshy, itself contemplated increases in the assessment work requirement. The $100 was expressed as a minimum, not as a flat rate in perpetuity.

I will close my remarks today simply by noting that it seems somewhat incongruous to argue that legislation which requires oil shale claimants to diligently mine the claims they received from the Federal government somehow violates their rights then under the Federal mining laws.

[The prepared statement of Ms. Zimmerman follows:]

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TESTIMONY OF KATHLEEN C. ZIMMERMAN
Counsel
Public Lands and Energy Division
National Wildlife Federation

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

OF THE

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

On the constitutionality of the S. 2089, the Oil Shale Mining Claims Conversion Act

22 April 1988

Chairman Melcher, members of the Subcommittee, my name is Kathleen Zimmerman. I am Counsel to the Public Lands and Energy Division of the National Wildlife Federation, the nation's largest private conservation/education organization with five million members and supporters in 51 states and territories. I appreciate this opportunity to appear before you today and hope that I may be able to provide some insight into the unique legal circumstances of oil shale mining claims on the public lands and the constitutionality of the Oil Shale Mining Claims Conversion Act under consideration by the Subcommittee.[1]

THE CONSTITUTIONALITY OF S. 2089.

The Oil Shale Mining Claims Conversion Act, S. 2089 has two components: 1) it eliminates the availability of the patenting provisions of the 1872 Mining Law to oil shale claimants; and 2) it increases the production requirements contained in the 1872

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[1] I also draw to the attention of the Subcommittee the previous testimony submitted by both Thomas Lustig and Karl Gawell on behalf of the National Wildlife Federation. Their testimonies address the history of the oil shale controversy as well as many of the environmental impacts of the land tenure losses. My statement today is limited to a discussion of the fifth amendment "takings" issue.

Law for these same claimants. In my opinion, both elements easily pass constitutional muster.

A. THE CONSTITUTIONALITY OF LIMITING THE AVAILABILITY OF PATENTS.

The fifth amendment to the Constitution prohibits the taking of private property for public purposes without just compensation. Opponents of S. 2089 can be expected to argue that denying a mining claimant the right to patent his claim constitutes a taking within the meaning of the fifth amendment's prohibition. This argument has little merit. Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

There is no vested right to a grant of title to federal lands pursuant to the mining law until the claimant meets all the requirements for issuance of patent. Id.; Alaska Miners v. Andrus, 662 F.2d 577 (9th Cir. 1981). These requirements include all the criteria for a valid claim, i.e. proper location and recordation, discovery of a valuable mineral deposit, and completion of annual assessment work. In addition, the claimant must have applied for a patent and paid the requisite fee.

None of the oil shale claimants allegedly affected by the proposed prohibition on the issuance of new mining patents have complied with these patenting requirements. Since no patent right has been vested, no taking of the claimants' property is worked by S. 2089. *Alaska Miners v. Andrus*, 662 F.2d 577; *Freese v. United States*, 639 F.2d 754 (Ct. Cl.), *cert. denied*, 454 U.S. 837 (1981).

With respect to mining patents, Congress repeatedly has been willing to preclude their issuance in legislation designating federal lands for special uses. *See*, *e.g.*, Sawtooth National Recreation Area Act of 1972, 16 U.S.C. Section 460aa *et seq.* (1982), Wilderness Preservation System Act, 16 U.S.C. Section 1131 *et seq.*, Steese National Conservation Area and White Mountain National Recreation Area Act of 1980, 16 U.S.C. Section 460mm *et seq.*, Oregon Cascades Recreation Area Act of 1984, 16 U.S.C. Section 460oo *et seq.*

Section 460aa-11 of the Sawtooth National Recreation Area Act provides that:

> [p]atents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States.

The constitutionality of this provision was upheld specifically by the United States Court of Claims in Freese v. United States, 639 F.2d 754. The plaintiff in the Freese case was the holder of five unpatented mining claims located on federal lands within the Sawtooth National Recreation Area. He argued that Congress' action terminating the ability of existing claim holders to proceed to patent claims located within the recreation area constituted an unconstitutional taking by inverse condemnation. The court disagreed, noting that while the plaintiff's opportunities had been somewhat narrowed, plaintiff had not suffered a deprivation of private property within the meaning of the fifth amendment:

> The case before us thus ultimately reduces to the question whether plaintiff has suffered an unconstitutional divestment solely be virtue of the fact he no longer has the option to apply for patents upon his claims. Common sense dictates a negative response. At best, plaintiff has suffered a denial of the opportunity to obtain greater property than that which he owned upon the effective date of the Sawtooth Act. This cannot fairly be deemed the divestment of a property interest, save by the most overt bootstrapping. 639 F.2d 758.

The Wilderness statute as well as the other statutes listed above place similar limitations on the ability of present claim holders to obtain patent to the land upon which their claims are located. S. 2089 would do no more.

In sum, the constitutional analysis offered by the legislation's opponents is flawed. This stems from the fact that they confuse the possessory interest in land which attends a valid mining claim with the grant of title to land represented by a mining patent. S. 2089 eliminates only the latter.

The proposed legislation does not "change the vested rights of the oil shale claimant" as the minority report on the House bill (H.R. 1039) contends.[2] Minority Views of the

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[2] The cases cited by the minority do not support their assertions of unconstitutionality. The judicial interpretation of the Alaska Native Settlement Claims Act merely asserts the possessory right of a mining claimant to exclude competing claimants from his mine site. The court also held there is no inalienable right to apply for and receive a mining patent. As the minority report indicates, the court recognized explicitly the authority of Congress to limit the availability of mining patents. *Alaska Miners v. Andrus*, 662 F.2d 577.

The citation to the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-27 (1974), in the report is equally unconvincing. The case does not hold, as the minority suggests, that the denial of the expectation of receiving a property right in the future constitutes an unconstitutional taking. Section 304 of the Regional Rail Reorganization Act, 45 U.S.C. 744, compelled the continued operation of a railway at a loss until such time as a reorganization plan was implemented. The government defendants admitted there was no assurance under the Act that such a reorganization plan would be implemented. The Court, therefore, concluded that the continued compelled erosion of railway assets might at some point constitute an impermissible taking of property. That point, according to the Court, does not occur until the railway "has suffered losses unreasonable even in the light of the public interest in continued rail service pending reorganization." *Regional Rail*, 419 U.S. 123-24; *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct

Committee's Report on H.R. 1039 (Report 100-43). The rights of the claimant in a mining claim are nothing more than the exclusive possession of the land for exploration and extraction. Black v. Elkhorn Mining Co, 163 U.S. 445, 450 (1896). The proposed legislation does not disturb this possessory interest of the oil shale claimant in the mine site. The claimant can continue to mine his claim and has ownership of any minerals extracted.[3]

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footnote continued
1232 (1987). The Court found no taking had occurred with respect to the Penn Central properties despite the existence of huge financial losses.

[3] Lastly, the minority cites Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984). However, the legislation challenged in Skaw is easily distinguishable from S. 2089. At issue in Skaw was Section 708 of the National Parks and Recreation Act of 1978, 16 U.S.C. 1274(a)(23). Section 708 of the National Parks and Recreation Act of 1978, unlike S. 2089, actually prohibited some forms of mining:

> [d]redge or placer mining shall be prohibited within the banks or beds of the main stem of the Saint Joe and its tributary streams in their entirety above the confluence of the main stem with the North Fork of the river.****
>
> For purposes of this river, there are authorized to be appropriated not more than $1,000,000 for the acquisition of lands or interest in lands. Id.

The plaintiffs in Skaw were holders of unpatented mining claims in the vicinity of the upper St. Joe River who sought compensation for a taking under Section 708 on the ground they had been denied all economical use of their claims. They argued that extraction of the mineral from their claims was impossible given the statutory prohibition against dredge or placer operations. Oil shale claim holders can make no such assertion with respect to S. 2089 since the proposed legislation does not prohibit the production of oil shale from their claims.

B. THE CONSTITUTIONALITY OF INCREASING THE AMOUNT OF ASSESSMENT WORK OR REQUIRING RECLAMATION.

Even with respect to vested property rights, Congress generally has the power to impose new regulatory constraints on the way those rights are used, or to condition their continued retention on the performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, Congress acts within its powers. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), Keystone Bituminous Coal 107 S.Ct. 1232.

The power to qualify existing property rights is particularly broad with respect to mining claims. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963), the United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. See, e.g., Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459

U.S. 400, 413 (1983). Moreover, the property right held by a mining claimant is only the right to a flow of income from production of the claim. United States v. Locke, 105 S.Ct. 1785, 1798 (1985). Such economic rights repeatedly have been held to be subject to the government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burden of economic life. See, e.g., National Passenger Railroad Corp. v. Atchison, T., & S.F.R. Co., 105 S.Ct. 1441 (1985); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1.

In United States v. Locke, 105 S.Ct. 1785, the Supreme Court upheld the validity of the mining claim recording provisions of the Federal Land Policy and Management Act, 43 U.S.C. Section 1744(a) (1982) stating that:

> ...there can be no doubt that Congress could condition initial receipt of an unpatented mining claim upon an agreement to perform annual assessment work and make annual filings. That this requirement was applied to claims already located by the time FLPMA was enacted and thus applies to vested claims does not alter the analysis, for any retroactive application of FLPMA is supported by a legitimate legislative purpose furthered by rational means. The purposes of applying FLPMA's filing provisions to claims located before the Act was passed - to rid federal lands of stale mining claims and to provide for centralized collection by federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining

> claims - are clearly legitimate. 105 S.Ct. 1798.

Increases in the annual work assessment and reclamation requirements can be justified similarly as actions to achieve legitimate legislative ends, i.e. the production of shale oil in an environmentally sound manner.

CONCLUSION.

It has been more than sixty years since Congress passed the Mineral Leasing Act and asserted its desire to retain oil shale lands in federal ownership. Yet in that interim, thousands and thousands of acres of public lands have been patented from which no commercial shale oil ever has been produced.

S. 2089 offers a legally sound and equitable solution to the oil shale claims controversy before the public and this nation lose another 200,000 acres to private parties who may never produce a drop of commercial oil.

Thank you for your attention.

Senator **Melcher**. Well, I am not enamored by any argument that the proposed bills are unconstitutional. But if they were, the Court could decide that. And all three of you have submitted very worthwhile testimony to the effect that, probably, they are not unconstitutional. .

So if people feel that, given the facts as they exist, they would like to challenge them on the basis of constitutionality, I think that burden falls on them. I do not know what Congress can do other than, the minimum we can do is pass a mild bill like these are. They are not very earth-shaking bills, either one of them. .

I want to thank you all for your testimony. I find it to be a very erudite type of testimony, and contributes greatly to the understanding of constitutional questions involved here, as well as what the application of the 1872 Act should be. I tend to agree with you on both points. Thank you very much. .

We will now have a panel of Mr. James Brannigan from Marathon Oil, and John Savage from Rifle, Colorado, and John Herr from Palo Alto, California, and Frederick Larson from Pacific Palisades, California. .

I will note that Mr. Brannigan is accompanied by John White, who is counsel of Patton, Boggs & Blow of this city. Mr. Brannigan, please proceed.

STATEMENT OF JAMES H. BRANNIGAN, SENIOR VICE PRESIDENT, WORLDWIDE EXPLORATION, MARATHON OIL CO.

Mr. **Brannigan**. My name is Jim Brannigan. I am Senior Vice President of Worldwide Exploration for Marathon Oil Company, located in Houston.

My comments are really directed to one provision of S. 2089, the provision relating to pending applications for oil shale patent.

Section 2 of the bill states that no patent for any oil shale mining claim shall be issued after February 5, 1987, except for those claims for which a patent application has been filed, and all requirements for a patent have been fully complied with by such date.

We are uncertain what all requirements for a patent means. In April 1986, Marathon filed a application for a patent to its six Portland claims in Colorado's Piceance Basin, 10 months before the cutoff date.

Does the "all requirements" phase mean that all statutory requirements for a valid mining claim have been completed? Thus the right to a fee title as asserted by filing, based upon full compliance with those statutory requirements, does the phrase "all requirements" mean something in addition to the ascertation of title? Even after proper patent applications have been filed?

This more expansive meaning of the phrase implies that all administrative requirements for processing the application must have been completed by the February 5 date.

The retroactive date of February 5, 1987 is inconsistent with the oil shale laws passed by Congress both before and after that date. And it is illogical, when viewed by congressional action taken on this very issue in July 1987.

The phrase, might cloud title to an oil shale claim, which have been patented since that date, and it results in an unfair and inequitable treatment of a group of claim owners who filed well before February 5, and have since fulfilled all the necessary requirements to obtain title to their claims.

February 5 is simply the date when the House bill, H.R. 1039, was introduced. Over four months earlier, on October 30, 1986, the continuing appropriations act provided that no funds could be used by the Secretary of the Interior for the patenting of any oil shale claim for a period of 180 days.

That 180-day period expired April 30, 1987, almost three months after the February 5 date. Thus all administrative action on pending applications was halted months before the 1987 cutoff date, and patent applicants were denied the opportunity to get their formally asserted rights processed by February 5, 1987.

In addition, the Department of the Interior initiated a self-imposed processing moratorium, which lasted to June 1, 1987, and this further frustrated the pending patent applicants and their efforts to move their rights forward.

To provide relief to this situation, it is important to consider the congressional action supplemental appropriations act of July 11, 1987. Here the Senate passed, and the House conferees agreed, to an amendment establishing an additional patenting moratorium to March 31, 1988, with the specific exemption of the oil shale patent applications that were then pending in the Department of the Interior, one of which was the Marathon case.

Congress spoke to the issue of pending oil shale patent applications in the July 11, 1987 act, and the debate on and the enactment of the July 11, 1987 law seems clear to us.

Congress recognized that there was a class of oil shale claimants whose patent applications were pending, or were being processed, and Congress in its fairness to itself and to the Secretary of the Interior, and the applicants, said those applications could be proceeded to be patented.

S. 2089 will annul the exception made last July, and retroactively impose an impossible condition on the applicants, who have yet to receive a patent. Because for some, all administrative requirements had not and could not have been completed by February 5, 1987.

Since July 11, 1987, Marathon has completed everything that the regulations require for mineral patent, including payment of the purchase price. But we still do not have a patent. Section 2 of S. 2089 should be clarified to carry out the intent and the purpose of the July 11, 1987 law.

Marathon has been actively and aggressively involved in oil shale for over 32 years. We are not speculators. Our employees have received international recognition for their efforts in research and development of various processes and inventions for the retorting of oil shale and the uses of oil shale and its products. A partial list of some of the more important events have been included in an attachment to this statement.

We purchased our interest in the Portland claims, the one affected by S. 2089, in the early 1970s. These tracts are part of our overall strategy for oil shale land acquisition programs.

The discovery of a valuable mineral deposit on the six Portland claims was based on the outcrop of the Mahogany Zone. This Zone is universally recognized as one of the richest and most consistent oil shale zones in the Green River formation.

I should also add that Marathon owns the surface to about half of these lands in the Portland claims by way of land exchange with the Colorado Division of Wildlife. Oil shales from these claims have been mined, sold to, and tested by Amoco and Gulf, the lease owners on Tract CA.

We have successfully tested the proprietary oil shale retorting technology, using superheated steam, at the Anzil Points, Colorado oil shale testing facility, owned by the Department of Energy and leased to the Paraho Group.

Buying about 4,000 tons of oil shale at Anzil Points, and during the test at our Anzil Points retort, we processed over 2,000 tons of that shale and produced in excess of 1,500 barrels of oil shale.

We were forced to abandon that work on May 10, 1982, when the Department of Energy canceled the Paraho lease. But we then went ahead and completed the project in 1985 at our research laboratories in Littleton, Colorado.

Marathon's oil shale patent applications for the Portland claims, our land exchanges with the State of Colorado, and the proposed exchange before the Bureau of Land Management, our regular participation and numerous comments on the Department of the Interior proposals affecting oil shale in the Piceance Basin, as well as our extensive research and laboratory investigations of oil shale, are all part of a comprehensive program we designed for oil shale development.

We were not involved in the settlement last year of the *TOSCO* case. We have tended to go it on our own. We are, however, caught up in a legislative process to terminate all future oil shale patents. We have done everything required of an applicant for a mineral patent.

When Congress passed the July 11, 1987 provision, authorizing the Secretary of the Interior to go forward with the patenting of a handful of specifically identified applicants, we expected that in the normal course of administrative events a patent would be issued to us.

And we continue to believe that this should be the case. And that S. 2089 should be clarified accordingly. Thank you very much.

[The prepared statement of Mr. Brannigan follows:]

STATEMENT

OF

JAMES H. BRANNIGAN

Senior Vice President
World-Wide Exploration

Marathon Oil Company

BEFORE THE

Subcommittee on Mineral Resources

Development and Production

of the

Committee on Energy and Natural Resources

UNITED STATES SENATE

April 22, 1988

MY NAME IS JAMES H. BRANNIGAN. I AM THE SENIOR VICE PRESIDENT, WORLD-WIDE EXPLORATION, FOR MARATHON OIL COMPANY IN HOUSTON, TEXAS. I HAVE BEEN IN CHARGE OF MARATHON'S OIL SHALE ACTIVITIES FOR THE PAST EIGHT YEARS AND I HAVE BEEN ASSOCIATED WITH ITS RESEARCH, DEVELOPMENT, AND LAND ACQUISITION MATTERS FOR OVER 25 YEARS.

MY STATEMENT AND COMMENTS ARE DIRECTED TO ONE PROVISION OF S. 2089. THAT IS THE PROVISION RELATING TO PENDING APPLICATIONS FOR OIL SHALE PATENTS. SECTION 2 OF THE BILL STATES THAT NO PATENT FOR ANY OIL SHALE MINING CLAIM "SHALL BE ISSUED AFTER FEBRUARY 5, 1987, EXCEPT FOR THOSE CLAIMS FOR WHICH A PATENT APPLICATION HAS BEEN FILED AND ALL REQUIREMENTS FOR A PATENT HAD BEEN FULLY COMPLIED WITH BY SUCH DATE." MARATHON FILED AN APPLICATION FOR A PATENT TO ITS SIX PORTLAND CLAIMS IN THE PICEANCE BASIN IN COLORADO IN APRIL 1986, TEN MONTHS BEFORE THE CUT-OFF DATE.

THE SO-CALLED EXCEPTION HAS TWO PARTS. FIRST, THE APPLICATION MUST HAVE BEEN FILED BY FEBRUARY 5, 1987 AND SECOND, ALL REQUIREMENTS FOR A PATENT FULLY COMPLIED WITH BY THAT DATE.

THE DATE BY WHICH A PATENT APPLICATION MUST HAVE BEEN FILED IS CLEAR. BUT WE ARE UNCERTAIN AS TO WHAT "ALL REQUIREMENTS FOR A PATENT" MEANS.

MANY AUTHORITIES DESCRIBE THE LOCATION OF A MINING CLAIM AS A SERIES OF ACTS, AND THE ADMINISTRATIVE PROCESS OF PATENTING A CLAIM AS A SEPARATE SERIES OF ACTIONS. ONE READING OF THE "ALL REQUIREMENTS" PHRASE IS THAT ALL STATUTORY REQUIREMENTS FOR A VALID MINING CLAIM HAVE BEEN FULFILLED AND THE RIGHT TO A FEE TITLE IS BEING ASSERTED BY FILING A PATENT APPLICATION BASED UPON FULL COMPLIANCE WITH THOSE STATUTORY REQUIREMENTS. ON THE OTHER HAND, IT MAY BE THAT THE PHRASE "ALL REQUIREMENTS" REFERS TO SOMETHING IN ADDITION TO FULFILLMENT OF THE STATUTORY REQUIREMENTS FOR A MINING CLAIM AFTER A PROPER PATENT APPLICATION HAS BEEN FILED. A BROADER AND MORE EXPANSIVE READING OF THE PHRASE IS THAT ALL ADMINISTRATIVE REQUIREMENTS INVOLVED IN PROCESSING THE PATENT APPLICATION HAD BEEN COMPLETED BY FEBRUARY 5, 1987.

THE RETROACTIVE DATE OF FEBRUARY 5, 1987 IS INCONSISTENT AND CONFUSING WHEN COMPARED WITH THE OIL SHALE LAWS PASSED BY

CONGRESS BOTH BEFORE AND AFTER THAT DATE. IT IS ILLOGICAL WHEN VIEWED BY CONGRESSIONAL ACTION TAKEN ON THIS VERY ISSUE FIVE MONTHS AFTER THAT DATE. IT MAY CAUSE A CLOUD ON THE TITLE TO THE OIL SHALE CLAIMS WHICH HAVE BEEN PATENTED SINCE THAT DATE. AND IT RESULTS IN THE HIGHLY UNFAIR AND INEQUITABLE TREATMENT OF A GROUP OF CLAIM OWNERS WHO FILED BEFORE FEBRUARY 5 AND HAVE SINCE FULFILLED ALL REQUIREMENTS OF THE LAW TO OBTAIN TITLE TO THEIR CLAIMS.

THE DATE FEBRUARY 5, 1987 HAS NO MAGIC. IT IS SIMPLY THE DATE WHEN THE HOUSE BILL, H.R.1039, WAS INTRODUCED. WHAT IS IMPORTANT IS THE OIL SHALE LAW IN FORCE ON THAT DATE. FOUR MONTHS EARLIER, ON OCTOBER 30, 1986, THE CONTINUING APPROPRIATIONS ACT FOR FY 1987 BECAME LAW AND IT PROVIDED THAT NO APPROPRIATED FUNDS COULD BE USED BY THE SECRETARY OF THE INTERIOR FOR THE PATENTING OF ANY OIL SHALE CLAIM FOR A PERIOD OF 180 DAYS, WITH CERTAIN EXCEPTIONS WHICH ARE NOT HERE RELEVANT. THAT 180-DAY ERIOD EXPIRED APRIL 30, 1987, ALMOST THREE MONTHS AFTER THE FEBRUARY 5 DATE. AS A RESULT OF THE OCTOBER 1986 LEGISLATIVE MORATORIUM, ALL ADMINISTRATIVE ACTION ON PENDING APPLICATIONS WAS

COMPLETELY HALTED SEVERAL MONTHS BEFORE THE FEBRUARY 5, 1987 CUT-OFF DATE. THUS, THE PATENT APPLICANTS WERE DENIED AND TOTALLY FRUSTRATED IN ANY OPPORTUNITY TO GET THEIR FORMALLY ASSERTED RIGHTS PROCESSED ADMINISTRATIVELY BY THE CUT-OFF DATE. IN ADDITION, THE DEPARTMENT OF THE INTERIOR PLACED ON ITSELF A PROCESSING MORATORIUM WHICH LASTED UNTIL JUNE 1, 1987, FURTHER FRUSTRATING THE PENDING PATENT APPLICANTS AND THEIR EFFORTS TO MOVE THEIR RIGHTS FORWARD.

WE THINK WHAT IS MOST IMPORTANT IS THE HOUSE AND SENATE ACTION AFTER THE HOUSE PASSED ITS OIL SHALE LEGISLATION ON JUNE 2, 1987. DURING CONSIDERATION OF THE SUPPLEMENTAL APPROPRIATIONS BILL IN MAY AND JUNE OF LAST YEAR, WHICH BECAME LAW JULY 11, 1987, THE SENATE PASSED, AND THE HOUSE CONFEREES AGREED TO AN AMENDMENT ESTABLISHING A FURTHER MORATORIUM TO MARCH 31, 1988, ON PATENTING OIL SHALE MINING CLAIMS WITH A SPECIFIC EXCEPTION FOR THE CLASS OF OIL SHALE PATENT APPLICATIONS PENDING IN THE DEPARTMENT OF THE INTERIOR WHICH WERE EXEMPTED BY CASE FROM THE MORATORIUM. APPROPRIATED FUNDS WERE AUTHORIZED TO PROCESS AND PATENT THOSE PENDING APPLICATIONS. MARATHON'S

APPLICATION IS IN THAT CLASS.

IT SEEMS TO US THAT CONGRESS HAS SPOKEN TO THE ISSUE OF PENDING OIL SHALE PATENT APPLICATIONS IN THE JULY 11, 1987 ACT. THE DEBATE ON AND ENACTMENT OF THE JULY 11, 1987 LAW SEEM TO US CLEAR. CONGRESS RECOGNIZED THAT THERE WAS A CLASS OF OIL SHALE CLAIMANTS WHOSE PATENT APPLICATIONS WERE PENDING; THEY WERE BEING PROCESSED, THAT COMPLETION OF PROCESSING WAS IN VARIOUS STAGES, AND, IN FAIRNESS TO THE CONGRESS, TO THE SECRETARY OF THE INTERIOR, AND TO THE APPLICANTS, THOSE APPLICATIONS COULD PROCEED TO PATENT.

S. 2089 CAN WELL BE INTERPRETED TO ANNUL THE EXCEPTION MADE LAST JULY AND TO RETROACTIVELY IMPOSE AN IMPOSSIBLE CONDITION ON THE APPLICANTS WHO HAVE NOT RECEIVED A PATENT BECAUSE, FOR SOME, ALL ADMINISTRATIVE REQUIREMENTS HAD NOT AND COULD NOT HAVE BEEN COMPLETED BY FEBRUARY 5, 1987. SINCE THE JULY 11, 1987 LAW, MARATHON HAS COMPLIED WITH EVERYTHING THAT THE STATUTE, THE REGULATIONS, AND THE INSTRUCTIONS OF THE DEPARTMENT OF THE INTERIOR REQUIRE FOR A MINERAL PATENT, INCLUDING PAYMENT OF THE PURCHASE PRICE. BUT WE STILL DO NOT HAVE A PATENT. IN OUR VIEW, SECTION 2 OF S. 2089 SHOULD BE CLARIFIED TO CARRY OUT THE INTENT AND PURPOSE OF THE JULY 11, 1987 EXEMPTION.

I HAVE SOME BRIEF COMMENTS TO MAKE ABOUT MARATHON'S OIL SHALE DEVELOPMENT ACTIVITIES. WE ARE NOT SPECULATORS. MARATHON HAS BEEN ACTIVELY AND AGGRESSIVELY INVOLVED IN OIL SHALE FOR OVER 32 YEARS. WE HAVE TENDED TO GO IT ON OUR OWN OR HAVE BEEN THE LEADER OF A SMALL GROUP. SOME OF OUR EMPLOYEES HAVE RECEIVED INTERNATIONAL RECOGNITION FOR THEIR EFFORTS IN RESEARCH AND DEVELOPMENT OF VARIOUS PROCESSES AND NEW INVENTIONS FOR RETORTING OIL SHALE AND THE USES OF SHALE OIL AND ITS PRODUCTS.

THROUGHOUT EACH YEAR BEGINNING IN 1956, WE HAVE PERFORMED RESEARCH AND LABORATORY INVESTIGATIONS OF OIL SHALE RETORTING, ASSAYING OIL SHALE SAMPLES, THE ISOLATION OF CHEMICALS FROM PRODUCTS DERIVED FROM OIL SHALE, AND A MYRIAD OF OIL SHALE AND SHALE OIL FEASIBILITY STUDIES. A PARTIAL LIST OF SOME OF THE MORE IMPORTANT EVENTS HAS BEEN INCLUDED IN AN ATTACHMENT TO THIS STATEMENT.

IN 1957 MARATHON DRILLED ONE OF THE FIRST WELLS THROUGH THE DEEPER OIL SHALE SECTIONS IN THE CENTER OF THE PICEANCE BASIN, AND, BASED ON THE INFORMATION DERIVED FROM THAT WELL, THE U.S. BUREAU OF MINES WAS ABLE TO PUBLISH A GREATLY ENLARGED RESOURCE REPORT ON POTENTIAL OIL YIELDS OF THE GREEN RIVER OIL SHALE FORMATION IN COLORADO DUE TO THE RICH, DEEP OIL SHALE.

IN LATE 1957, MARATHON PURCHASED THE MINERAL ESTATE IN SOME 760 ACRES OF OIL SHALE LANDS ON PICEANCE CREEK AND IN 1963, WE DRILLED A COREHOLE ON THAT LAND WHICH VERIFIED THE CONCLUSIONS OF PREVIOUS OIL YIELDS DERIVED FROM THE 1957 WELL AND FOR THE FIRST TIME DISCOVERED THE BEDDED NAHCOLITE DEPOSITS AND DAWSONITE STRINGERS OCCURRING IN THE RICH LOWER OIL SHALE ZONES OF THE INTERIOR PICEANCE BASIN. AS A RESULT OF THE INFORMATION DERIVED FROM THIS SECOND WELL, A VALUABLE SODIUM MINERAL RESOURCE WAS RECOGNIZED AND IS NOW FIRMLY ESTABLISHED IN THIS PART OF THE BASIN AND IT LED TO A COMMERCIAL VENTURE FOR THE SOLUTION MINING EXTRACTION OF NAHCOLITE.

MARATHON, THROUGH ITS EMPLOYEES, HAS RECEIVED 19 NEW AND INNOVATIVE INVENTION PATENTS FOR DIFFERENT PROCESSES RELATING TO THE RETORTING OF OIL SHALE, THE IN SITU COMBUSTION FOR OIL RECOVERY FROM SHALE, AND HAS LICENSED TO OTHERS OUR DEVICE FOR

DETERMINING THE KEROGEN CONTENT OF OIL SHALE CORES. WE HAVE RECEIVED AN INVENTION PATENT FOR THE EXTRACTION OF THE ALUMINA FROM THE DAWSONITE-BEARING OIL SHALE.

BEGINNING IN 1971 WE ORGANIZED AND DIRECTED A GROUP OF PROSPECTIVE BIDDERS IN WORK LEADING TO THE FIRST FEDERAL OIL SHALE LEASE SALE IN THE PICEANCE BASIN AND NOMINATED WHAT ULTIMATELY WAS LEASED AS TRACT C-a. IN 1973 MARATHON JOINED THE 17 PARTICIPANTS IN THE PARAHO OIL SHALE RETORTING DEMONSTRATION PROGRAM, WHICH REMAINED ACTIVE THROUGH 1985.

WE PURCHASED OUR INTEREST IN THE PORTLAND CLAIMS -- THE ONES AFFECTED BY S. 2089 -- IN THE EARLY 1970'S AS A TRACT WHICH WAS TO BECOME THE CENTERPIECE OF OUR OIL SHALE LAND ACQUISITION PROGRAM. THE DISCOVERY OF A VALUABLE MINERAL DEPOSIT ON THE SIX PORTLAND CLAIMS -- EACH AN OIL SHALE PLACER LOCATED IN 1918 -- WAS BASED ON THE OUTCROP OF THE MAHOGANY LEDGE OR ZONE ON EACH CLAIM. THE MAHOGANY LEDGE IS UNIVERSALLY RECOGNIZED AS ONE OF THE RICHEST AND MOST CONSISTENT OIL SHALE ZONES IN THE GREEN RIVER FORMATION IN COLORADC. OIL SHALE FROM THESE CLAIMS HAS BEEN MINED AND TESTED BY THE LEASE OWNERS OF TRACT C-a.

IN ADDITION, WE ACQUIRED IN 1980 THE OIL SHALE AND FEE TITLE TO ALMOST 4,000 ACRES IN THE PICEANCE BASIN. IN EARLY 1984 WE FILED WITH THE BUREAU OF LAND MANAGEMENT AN APPLICATION FOR THE EXCHANGE OF ALL OF OUR FEE-OWNED PROPERTIES FOR LANDS OWNED BY THE UNITED STATES AND MANAGED BY THE BLM. THE LANDS WE ASKED FOR IN EXCHANGE ARE ADJACENT TO THE EAST AND NORTH BOUNDARIES OF THE PORTLAND CLAIMS. IN 1985 WE COMPLETED A 1,400-ACRE EXCHANGE WITH THE COLORADO DEPARTMENT OF WILDLIFE FOR SURFACE AND NON-OIL SHALE MINERALS. I SHOULD ADD THAT MARATHON OWNS TODAY THE SURFACE TO HALF OF THE LANDS IN THE PORTLAND CLAIMS.

BEGINNING IN 1980 WE INITIATED A PROGRAM TO TEST MARATHON'S PROPRIETARY OIL SHALE RETORTING TECHNOLOGY USING SUPERHEATED STEAM AT THE ANVIL POINTS, COLORADO, OIL SHALE TESTING FACILITY OWNED BY THE DEPARTMENT OF ENERGY AND LEASED TO PARAHO. WE MINED APPROXIMATELY 4,000 TONS OF OIL SHALE AT ANVIL POINTS AND, DURING OUR TEST AT THE ANVIL POINTS RETORT, RAN OVER 2,000 TONS OF THAT SHALE AND PRODUCED IN EXCESS OF 1,500 BARRELS OF SHALE OIL. THAT WORK CEASED ON MAY 10, 1982, WHEN THE DEPARTMENT OF ENERGY CANCELLED THE PARAHO LEASE AT ANVIL POINTS. TO COMPLETE THAT

PROJECT IN 1985, WE RAN OVER 50 SEPARATE OIL SHALE RETORTING TESTS AT OUR RESEARCH CENTER IN LITTLETON, COLORADO.

MARATHON'S OIL SHALE PATENT APPLICATION FOR THE PORTLAND CLAIMS; OUR LAND EXCHANGE PROPOSAL PENDING BEFORE THE BUREAU OF LAND MANAGEMENT, AND OUR COMPLETED EXCHANGES WITH THE STATE OF COLORADO; THE NUMEROUS PROTESTS OF DEPARTMENT OF THE INTERIOR PROPOSALS AFFECTING OIL SHALE IN THE PICEANCE BASIN AS OUTINED ON THE ATTACHMENT, AS WELL AS OUR EXTENSIVE RESEARCH AND LABORATORY INVESTIGATIONS ON OIL SHALE RETORTING, ARE ALL PART OF A COMPREHENSIVE PROGRAM WE DESIGNED FOR THE ULTIMATE DEVELOPMENT OF OIL SHALE.

WE WERE NOT INVOLVED IN THE SETTLEMENT LAST YEAR OF THE TOSCO CASE. AS I SAID EARLIER, WE HAVE TENDED TO GO IT ON OUR OWN. WE ARE, HOWEVER, CAUGHT UP IN THE LEGISLATIVE PROCESS TO TERMINATE ALL OIL SHALE PATENTS. WE HAVE DONE EVERYTHING REQUIRED OF AN APPLICANT FOR A MINERAL PATENT. WHEN CONGRESS PASSED THE JULY 11, 1987 PROVISION WHICH AUTHORIZED THE DEPARTMENT OF THE INTERIOR TO GO FORWARD WITH THE PATENTING OF A HANDFUL OF SPECIFICALLY IDENTIFIED APPLICATIONS, WE ASSUMED THAT, IN THE NORMAL COURSE OF ADMINISTRATIVE EVENTS, A PATENT WOULD BE ISSUED TO US. WE CONTINUE TO BELIEVE THAT THAT IS AND SHOULD BE THE CASE, AND THAT S. 2089 SHOULD BE CLARIFIED ACCORDINGLY.

THANK YOU.

PARTIAL LIST OF SIGNIFICANT EVENTS IN MARATHON OIL COMPANY OIL SHALE PROJECTS

June 1956	Marathon Oil Company (then named The Ohio Oil Company) establishes research center in Littleton, Colorado and initiates programs for oil shale technology which have been continuous to date.
September 1956	Marathon (MOC) spuds Ryan Creek #1 well near the center of the Piceance Basin, one of the first wells drilled through the entire Green River Formation in which cuttings were analyzed for oil yield content. Based on these data, official estimates of potential resource in Basin were almost tripled. (Bureau of Mines Report of Investigations 5614, November 1959).
September 26, 1961	MOC purchases oil shale and other mineral interests in Stecker Ranch on Piceance Creek (760 acres).
September 26, 1961	MOC employees issued patents on preparation, performance and process of in situ oil shale retorting (Nos. 3,001,775 and 3,001,776).
October 23, 1962	MOC employees issued patent for removing shale oil mist from off gas filter in oil shale retort (No. 3,059,393).
July 1963	MOC initiates project with Cameron Engineers, Denver, Colorado (now The Pace Consultants, Houston, Texas) for a biannual review of oil shale and related non-petroleum resources evolving into a nationally recognized quarterly, widely circulated Synthetic Fuels Report, published to date.
November 12, 1963	MOC spuds Square "S" corehole on Stecker Ranch, which was the first discovery of nahcolite and dawsonite in deep oil shale sections of the Green River Formation.
April 30, 1964	MOC presents principal paper on In Situ Processing of Colorado Oil Shale at the First Annual Oil Shale Symposium, Colorado School of Mines.

June 1, 1964	MOC employees issued patent for in situ combustion for oil recovery of oil shale, tar sands, and conventional petroleum reservoirs (No. 3,127,935).
September 1, 1964	MOC employee issued patent for continuous destructive distillation and carbonization in retort (No. 3,141,834).
October 1, 1965	MOC initiates study at Stanford Research Institute, Palo Alto, California, for economics and technology of shale oil production.
March 1, 1966	MOC presents principal paper at 58th Annual Meeting of American Institute of Chemical Engineers on Kinetics of Oil Shale Pyrolysis.
September 1, 1966	MOC licenses use and manufacture of its proprietary Gamma Ray Attenuation Porosity Evaluator (GRAPE) for continuous analysis of kerogen content in oil shale cores.
July 15, 1969	MOC (through contract subsidiary) completes Portland Claim No. 4, Corehole No. 1 to 1,342 feet below collar for use in feasibility of open pit oil shale mining operation.
March 31, 1970	MOC employees issued patent for recovery of alumina from dawsonite-bearing oil shale (No. 3,503,705).
June 30, 1970	MOC leases to Shell Oil Company acreage in Stecker Ranch for in situ demonstration project for recovery of shale oil.
November 1, 1970	MOC begins annual reviews and evaluations of oil shale and associated minerals resource base in the Portland Claims and technologies to start an open-pit mining operation on those claims.
December 1971	MOC forms group for nomination of lands for Federal Prototype Oil Shale Lease program.
November 1972	MOC-led group completes six coreholes on area nominated and ultimately leased by the Department of the Interior as Colorado Tract C-a.

May 1, 1973	MOC employee issued patent for process to recover shale oil from fractured oil shale following underground nuclear explosive device (No. 3,730,720).
November 20, 1973	MOC joins Paraho Oil Shale Retorting Demonstration Program, sponsored by 17 industrial parties at an overall cost in excess of $10 million.
January 8, 1974	MOC $80 million lease bonus bid on Tract C-a of Federal Prototype Oil Shale Lease Program is third highest of eight bids.
June 13, 1974	Department of Interior issues policy directive for oil shale land exchanges (I-7999).
September 18, 1974	MOC completes confidential report for third party of evaluation of pumpability of raw shale oil in large-scale transportation at MOC Littleton, Colorado research center.
August 21, 1975	MOC completes purchase of interest in Portland Oil Shale Claims Nos. 1-6 in Piceance Basin.
September 25, 1975	MOC sells to owners of Tract C-a 100 tons of oil shale from Portland Claim No. 4 taken from Mahogany Zone (average 40 gallons per ton shale oil) and higher zones (average 19 gpt).
October 7, 1975	MOC employees issued patent for transportation process of high pour point shale oil as a residual fraction in slurry (No. 3,910,299).
December 30, 1975	MOC employee issued patent for recovery of organic matter from oil shale through molecular sulfur treatment (No. 3,929,193).
June 1, 1976	MOC employee issued patent for vapor phase water dual heat transfer agent in retort recovery of shale oil (No. 3,906,702).

July 1977	Bureau of Mines issues Report 156 (1-77), "Technical and Cost Evaluation of Candidate Large-Scale Open-Pit Shale Mining Methods in Colorado; Technical and Economic Study of an Integrated Single Pass Mining System for Open-Pit Mining of Deep Oil Shale Deposits," showing the mine to start on and consume all of Portland Claims Nos. 1-6 as the mining faces move eastward.
April 18, 1978	MOC employee issued patent for counter-current and co-current combustion process in vertical in situ retort with midpoint ignition (No. 4,084,640).
September 1, 1978	MOC completes confidential report for third party of evaluation of pumpability of raw and treated shale oil at MOC research center.
December 31, 1980	MOC purchases fee-owned lands and interests in oil shale and associated minerals from Bell Petroleum Company in Piceance Basin (3,532 acres).
March 15, 1981	MOC enters into contract with Paraho to test proprietary oil shale retorting technology at Department of Energy-owned Anvil Points Oil Shale Test Facility with construction of modified retort begun April 24, 1981.
October 5, 1981	MOC completes mining 4,000 tons of oil shale at Anvil Points mine.
December 1981	MOC begins testing at Anvil Points retort using superheated steam proprietary technology.
May 10, 1982	MOC terminates Anvil Points retort tests when Department of Energy fails to renew or extend the Paraho lease of the facility. Over 1,500 barrels of shale oil was produced from the 2,000 tons of oil shale retorted.
July 22, 1982	BLM announces preparation of a Resource Management Plan for the Piceance Basin (47 F.R. 31756).

May 25, 1983	BLM issues procedures for determining value of lands for exchanges containing oil shale and associated minerals (IM 83-560).
August 15, 1983	Rio Blanco Oil Shale Corporation (RBOSC) files 6,400 acre lease application for waste disposal site adjoining Tract C-a (C-37344).
September 26, 1983	BLM issues instructions for consideration of fee exchanges of leasable and salable minerals (IM 84-81).
September 30, 1983	RBOSC files 2,725-acre exchange application (C-37765) for lands adjoining MOC's Portland Claims.
October 21, 1983	MOC files objections to RBOSC waste disposal site selection.
February 7, 1984	BLM announces preparation of joint Piceance Basin RMP/EIS (49 F.R. 4536).
March 26, 1984	MOC files objections to RBOSC waste disposal lease and its proposed land exchange.
April 1984	BLM issues Draft Piceance Basin Resource Management Plan and Environmental Inpact Statement (RMP/EIS).
May 22, 1984	BLM rejects RBOSC land exchange application.
June 22, 1984	MOC files land exchange application with Bureau of Land Management (C-37805; 5,939.18 acres).
July 8, 1984	BLM announces public hearings on RBOSC waste disposal lease (49 F.R. 27826).
August 13, 1984	MOC files objections and comments to BLM proposed EIS procedure for RBOSC waste disposal lease.
December 31, 1984	BLM contracts with MOC for payment for processing MOC's exchange application.
March 1985	BLM issues Final Piceance Basin RMP/EIS.

March 1, 1985	Action suspended on MOC's proposed land exchange application.
April 8, 1985	MOC files protest to Final Piceance Basin RMP/EIS on oil shale exchanges and related issues.
September 1985	BLM issues Draft EIS for Tract C-a waste disposal lease.
November 21, 1985	MOC completes land exchange with the State of Colorado Division of Wildlife for 1,400 acres of surface estates, water rights, and non-oil shale minerals, including 480 acres of the surface of the Portland Claims.
December 4, 1985	MOC files objections to Draft EIS for Tract C-a waste disposal lease.
January 7, 1986	BLM issues decision modifying in part Piceance Basin RMP/EIS pursuant to Marathon's protest.
April 4, 1986	MOC and co-owners file patent application for Portland Claims (C-43354), including the following: a. Duplicate originals of authorization of MOC and co-owners to apply and do business in Colorado (Exhibits A-D) b. Identification of claims by legal description and plats (Exhibits E, F) c. Certified copies of original and amended certificates (Exhibit G) d. Reports of natural features; evidence of discovery; affidavit regarding veins or lodes and affidavit regarding improvements (Exhibits H-J) e. Proof of posting notice of patent application on claims (Exhibit K) f. Statement regarding surface ownership (Exhibit L) g. Abstract of title (Exhibit M)

April 23, 1986	MOC files amendments to land exchange application (C-37805). Case is pending.
July 14, 1986	BLM issues amendments to land exchange policy for leasable and salable minerals (IM 86-581).
October 30, 1986	Public Law 99-59, Continuing Appropriations Act, FY 1987, October 30, 1986, 100 Stat. 3341-267, places 180-day moratorium on patenting oil shale placer claims by the Department of the Interior effective October 30, 1986.
October 31, 1986	BLM issues Final EIS for Tract C-a waste disposal lease (51 F.R. 39809).
December 4, 1986	MOC files objections to Final EIS for Tract C-a waste disposal lease--case pending.
December 31, 1986	Department of Interior announces self-imposed moratorium on processing oil shale patent applications until June 1, 1987.
February 5, 1987	H.R. 1039 introduced by Congressman Rahall and others to amend Section 37 of the 1920 Mineral Leasing Act relating to oil shale claims.
May 27, 1987	Senate adopts "Melcher-Wirth Amendment No. 222" providing for a moratorium to March 31, 1988 on patenting oil shale claims except for ten applications for patents, pending on February 5, 1987, by case number.
June 1, 1987	Department of Interior self-imposed moratorium expires.
June 2, 1987	House passes H.R. 1039
June 5, 1987	MOC receives verbal authorization from BLM for publication of notice of patent application.
June 9, 1987	BLM District Office, Craig, Colorado, gives motice for its field examination of Portland Claims to be conducted in June and July 1987.
June 18, 1987	Notice of MOC patent application published in Rangely Times for period of 60 days.

June 24, 1987	BLM mineral examiner and MOC representatives begin field examination of Portland Claims.
June 30, 1987	House agrees to Melcher-Wirth amendment (105 C.R. H5932).
July 11, 1987	Melcher-Wirth amendment becomes law. Supplemental Appropriations Act of July 11, 1987, 101 Stat. 391, 416, P.L. 100-71.
July 1987	BLM mineral examiner continues field work on Portland Claims
August 16, 1987	Publication of 60-day notice of MOC patent application runs out.
September 22, 1987	BLM mineral examiner forward two samples of oil shale taken from Portland Claim No. 5 to Hazen Research, Inc., Golden, Colorado, for Fisher assay report.
October 7, 1987	BLM mineral examiner receives results of Fisher Oil Shale Assay Report for samples of oil shale taken from Portland Claim No. 5.
December 8, 1987	MOC and co-owners file final proof fo oil shale patent application with BLM showing: a. Proof of continuous posting on claims of patent application b. Affidavit of pubisher of *Rangely Times* of 60-day publication c. Statement of payment of charges of publication and posting d. Application to purchase e. Payment of purchase price for lands in Portland Claims Nos. 1-6
February 24, 1988	S. 2089 introduced, Senators Melcher and Wirth, relating to oil shale claims.

Senator **Melcher**. Thank you, Mr. Brannigan.

Mr. Savage.

STATEMENT OF JOHN W. SAVAGE, RIFLE, CO

Mr. **Savage**. I have a written statement which has been submitted for the record. In view of the time, I will forgo reading that.

What I would like to do in a couple minutes is try and address some of the questions that were raised earlier on an ad hoc basis.

Senator Wirth in his opening remarks questioned whether oil shale was a valuable mineral. That question was litigated for 15 years, culminating in a 1980 Supreme Court case referred to as the Shell case.

And I think it reinstituted the original intent of the 1872 Mining Law, which said that the determination of a valuable mineral is more in the mind of the miner than an independent evaluator.

And I think it acknowledge the impetus that drove my ancestors and many of the miners in the West to explore for minerals and locate claims that they could not prove today it was worth something, but they had an inherent belief that it was.

He also mentioned the question of what to do with, the practical problem of what to do with shale, spent shale after it has been extracted. I am not a technical, I am not an engineer, and I cannot address the real technical aspects of that problem.

But it is a problem. You retort shale and you end up with more volume than you started with. You have got less weight, but any time you break up a solid into smaller pieces you will have more of it. And, in fact, when you retort shale, it may expand to a certain extent also.

It is a practical problem. Much of the spent shale will be returned from where the oil shale was mined, and the rest of it, as Union is doing now, and other plans have been, is to stockpile it in an environmentally acceptable manner, close to the area where it has been mined.

In fact, you come up with more flat ground in the rest of Colorado than we have now, which is somewhat desirable for some of us that have an agricultural background.

Senator Wirth also had a discussion on the assessment work requirement. I obviously have heard the quote from the Mining Law that requires $100 worth of work every year, practically since I could talk.

And it is true, that is the requirement there. But what people forget is what the impetus and the intent behind that was, to give other miners an objective standard to determine whether that piece of ground that had been staked by a prior locater was still being worked or not.

Rather than rely on old common law abandonment rules, he could check the records, check the ground. And if it had not been worked in the last year, he could relocate it. There is nothing in that statute that says, failure to do $100 worth of work every year results in a forfeiture of that claim back to the public domain. Nothing in the 1872 Mining Law says that, and certainly nothing in the 1920 Mineral Leasing Act says that.

One of the prior witnesses talked some about the Locke decision and FLPMA. I think the key in the Locke decision to why FLPMA was upheld, and it was a very rough decision on the people involved on that case. I mean, they missed the filing deadline by 12 hours or a day and a half or something like that, and lost their claims.

But the key to that case is that there was notice, several years of notice, before the filing requirements of FLPMA took effect. And I remember my father in the mid-1970's spending hours and hours making the filings required by FLPMA. But the key to it was notice. S. 2089 and H.R. 1039 may be appropriate, but only if we have some notice.

Again, we got back, in another witness' testimony, to this problem, this accusation that we are acquiring this land for other purposes. There are no other uses. A small amount of grazing, with no economic value to it at all, in terms of an investment standpoint. Net of $1 or $2 an acre per year to the landowner.

There is some recreation use, a couple weeks a year. We have, many of the ranchers and private landowners in the West are starting to try and create some revenue from hunting, simply as an economic necessity. The agriculture business being what it is.

On our private ranch land where we have done that, we have been making about $1 a year. So my gross proceeds from oil shale-like lands is approximately $1.50 or $2 a year. It would not justify my airplane ticket to Washington to these hearings.

A lot of comment has been made about our sitting on our hands for 60 years and not patenting these claims. If one looks back at the history, there really has not been that much time.

The claims were all located generally during the period 1915 to 1919. There was a lot of work in the 1920's, people were working on technology. Fifteen or twenty plants were built in western Colorado, a couple in Utah. A lot of land was patented.

By the mid-1920's new discoveries of conventional crude were made, and the price of oil collapsed. So many people had to relocate their activities and find something else to generate income so they could support their oil shale activities.

As a few of them started to do that, we had the crash and the Depression, and then World War II. I go through this because it parallels my father's career, and it was not until the late 1940's, after World War II, that he could come back and start working back on oil shale, which he did.

It took a long time to gather the title back up, to assemble these blocks of land and get prepared to go for the patent. And he had to make a living while he was doing it. Mostly during the fifties it was as a consultant for other oil companies, working on other people's claims. So he could only work on his own claims when he had the time and the money to do it.

And finally, in the late fifties he got to the point where he could start filing patent applications, which he did. He only got one patent application granted that he had an interest in, a 17½-percent interest in one block of land.

The rest of his applications—he had three that were finally filed in the late fifties—got stalled by the change in policy in the Department of Interior in the early sixties, and the litigation started.

At that point, all our efforts went into pursuing the litigation. There was no way we could file additional patent applications when the federal government was challenging every oil shale claim in existence, unpatented claim, on all fronts, and had even taken the step of filing cases against previously issued patents to cancel those.

So we could not go out and file more patent applications at that point. And as you have heard many times, that litigation continued until August 4, 1986, and in fact did not stop then.

Immediately Congressional action started to put a moratorium, to cancel the settlement agreement, moratoriums on patent processing, and the state of Colorado and other groups filed a lawsuit to stop the settlement. And that was only disposed of a couple weeks ago.

And now, in the last few months a lot of us are finally seeing to the point where maybe we can go ahead and file patent applications, something might amount to it. Mr. Larson has filed applications. We have got some pending, and some other people do also.

I think the final question is, what are we here looking for? We are looking for what we think is a fair break. We have been in this business a long, long time. We think we have been promised things under the 1872 mining law and the regulatory actions of the Department over the years. We think we are entitled to a fee simple patent under the mining law.

But in reality, we know we are not going to get it at this point. We think we ought to be treated the same as the claimants under the settlement, the 1986 settlement, and that is why we were in the litigation.

We had a group of claims in each block of the litigation, but those were not solely intended to just get those claims patented. They were the test cases for the rest of our holdings, also. There was no reason to dump them all into the hopper. They just made a bigger job to argue the same issues.

So I think what would be the fairest treatment is under the settlement.

But the last response is, what will we accept, and that is the Department of the Interior proposal. It does not give us much and takes away a lot of what we are entitled to. But it gets us the oil shale, which is what we have been working for for three generations.

Thank you.

[The prepared statement of Mr. Savage follows:]

STATEMENT OF JOHN W. SAVAGE, JR. BEFORE THE SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION, UNITED STATES SENATE, CONCERNING S. 2089 AND RELATED LEGISLATION REGARDING UNPATENTED OIL SHALE MINING CLAIMS. APRIL 22, 1988.

Thank you for affording me the opportunity to address S. 2089 and related legislation.

This is my third sojourn to these halls on this subject in the last 18 months and it will probably be my last. Neither my faith in this county's rule of law nor my pocketbook will support further efforts.

I am a third generation oil shaler. My grandfather located oil shale claims and worked to develop oil shale retorting technology until his death. My father picked up from him in the late 40's and continued until his death in 1984. Unfortunately twenty-five years of my father's life were consumed by the litigation which was settled by the 1986 compromise.

I was born to oil shale. My mother tells of the summers carrying kids on her back while she ran a survey rod for my father. Many of my summers as a youngster were spent in the Piceance Basin with my father doing assessment work and proving up oil shale claims. I eventually went to law school because our development of oil shale was stalled by the mining claim litigation. I would have preferred to be a geologist or an engineer but we needed a lawyer.

I represent the Savage family which owns a minority interest in three small blocks of patented oil shale lands, the JoJo Oil Shale Company which owns a minority interest in one large block and one small block. Both of these groups also own interests in several blocks of claims for which patents have not been applied for. I also represent Roger Collinson of California who owns one 40 acre claim located by his father.

I am here today to ask for justice and fairness for myself, my clients, and others who are in a similar position. I am not here to raid the public treasury, I am here to ask that the laws of this great nation be honored. If my request is honored, previously public lands will be transferred to private ownership, but that is what was promised by the 1872 Mining Law. That was the carrot that brought my ancestors and thousands of others to the West. S. 2089 reneges on that promise.

S. 2089 and H.R. 1039 are thinly disguised shams to confiscate our oil shale claims without compensation. Oil Shale is a valuable mineral that will someday be utilized for the great benefit of this country. But it is an industry that is not measured in years or even decades, but rather in generations. No doubt I and my predecessors would have been more financially prudent to forget oil shale and go fry hamburgers but we are not entirely driven by next years balance sheet. We are the people that make the great discoveries and push back the frontiers. We proceed on faith and belief rather than economic projections.

S. 2089 and its companion H.R. 1039 present intolerable alternatives. Either accept a lease which leaves the claim holder almost nothing or maintain a claim only by spending a ruinous amount each year for assessment work. The fair and honorable solution would be to give unpatented claim owners an opportunity to patent their claims under the same terms as the 1986 Settlement Agreement. This is far less than the fee simple absolute title we are entitled to under the Mining Law and fought for and won in the courts for 26 years but there has to be an end .

But even as I say this I and most of my fellow claim owners realize that the majority members have their own perceptions of fairness and justice. You do not feel bound to honor the commitments of their predecessors and no doubt believe you are serving the public good righting the wrongs you believe were committed by your predecessors. I am resigned that you will carry the day on this issue but hope that you will grant us tne oil shale resource we have been seeking for three generations.

The Department of Interior's proposed legislation is far less than we are entitled to but more than S.2089 and H.R. 1039 grant. The 1872 Mining Law gives the mining claimant the surface and all minerals. The 1986 Settlement took some of that away, the oil, gas, and coal, and restricted surface uses. The DOI proposal takes far more but does leave us the oil shale resource.

S. 2089 and H.R. 1039 are unfair, unjust, and quite likely will not resolve this issue. These bills are an invitation to many more years of litigation. There have always been a few oil shalers with the resources and fortitude to carry on when all looked lost.

I am aware of the case law which validates some congressional actions depriving mineral claim holders of their right to a patent but it appears to me that those cases are distinguishable from this situation. Those cases which have upheld such congressional action have usually involved lands where congress has designated an alternative use incompatible with the mining claims such as wilderness areas or recreation areas. In the present situation the proposed legislation is simply a bald attempt to confiscate the oil shalers claims because of a preference for public ownership.

One of the reasons often cited for this legislation is that we have sat on these claims for many years and done nothing. That is simply not true.

All oil shale claims were located prior to 1920. Activity was strong into the mid 20's with a number of plants having been built and operated when new discoveries of conventional crude collapsed oil prices. On the heels of the price collapse the Department of Interior instigated a massive campaign to invalidate all oil shale claims which concluded in victory for the oil shalers in the Virginia Colorado and Krushnic cases. However, these victories came in the middle of the Great Depression and best anyone could do was hold on and wait for better times.

World War II caused another dislocation and oil shalers weren't able to get back to work until the late 40's. It took people such as my father the better part of the 50's to gather the resources and collect the fragments of two decades of dislocation to the point in the late 50's when he was ready to proceed to patent. My father rarely bought oil shale claims outright, he didn't have the money and most owners didn't want to sell but they would share their ownership with someone able to take the claims to patent.

By 1960 we were ready to go when the U.S. Government again interposed a roadblock by initiating challenges to all pending patent applications on all fronts. Once this new round of litigation started most oil shalers quit applying for patents and concentrated on the litigation. I don't think anyone expected it to take 26 years for a resolution. Applying for patent entails a substantial amount of work and money which many of us were unable to expend until we knew what the results of the litigation were going to be. We expected that the cases being litigated would be the test cases that would govern the fate of our remaining unpatented claims. While the litigation ran its course there was little point in proceeding with these claims.

Whatever the legislation decided on we should be given some period of time however short to file applications under some grandfather provisions, preferably the 1986 settlement but at least the DOI proposal. The retroactivity of the present bills is reprehensible.

Too much money, too many peoples lives, and too many resources have been wasted in the last 70 years disputing these issues. It is time to lay these issues to rest and get on with the job of utilizing these great resources for the production of oil in an economic and environmentally acceptable manner for all of us.

Senator **Melcher**. Thank you, Mr. Savage.
Dr. Herr.

STATEMENT OF DR. JOHN J. HERR, OWNER, AGUILA ENERGY UNPATENTED OIL SHALE CLAIMS

Dr. **Herr**. That is me. My name is John Herr, and I am the third John Herr. My grandfather was also named John Herr and so is my father.

I am the third member of my family to be involved in this, and I would like to see it get resolved, because it has been dragging on for a long time and I do not have children, so I have no sons or daughters to carry on the battle.

And I think, Senator Melcher, when you mentioned that this is not particularly big legislation, it is not, but it is big to those of us who are involved with it or have been involved with it in our families for some time. In particular, I have got 64 claims, which is about 9,000 acres or so.

My grandfather came from Ohio when he was 18, knocked around the mining towns for a while. Then he moved down to Durango, went to work for his brother in a lumber yard for a year or so.

And then he moved to the assay office, and he said within five years, a lot of hard work, diligent studying, and also the fact that the assayer drank a bottle of whiskey a day, he owned half of the assay office and the ore market. And in that capacity, he became quite successful, and in fact I suppose you could say went into semiretirement when he married my grandmother.

He was about 34. They got married. She was from a silver mining family. They moved. It was great, they would spend their summers in Colorado, the winters in California, and did quite well.

And then he got involved with oil shale and he staked these claims and acquired some others, and then put the whole package together, he and his colleagues. And in fact, it looked to them like they were quite successful.

In 1922 alone he spent $125,000. Now, talk about inflation. I wish he had bought savings bonds or IBM. That is a lot of money.

He did not need to spend that money in 1922. He could have filed for patent. He did not. And I asked him about that in the fifties and he said: Why should I? He said: The value was in the claim. He said: The claim is valid. He said: There was no reason to go to patent. He said: I spent the money developing the resource.

And I was glad to see Mr. Leshy talk about the fact that many, many miners never patent their claims. That is why we have not gone to patent. It seemed to us like going to patent—it seemed to my grandfather like a foolish thing to do when it is futile.

There is someone in this room that has had a patent application pending with Interior since 1935. So how can you say, well, why did you not do it?

The other thing is, it just invites litigation. And I am not an attorney, and I notice that two of the other folks who are here who are from families, they have an attorney in the family. John I suspect went to law school because his family needed an attorney.

My attorney is my old college roommate, who is also from Colorado and who had showed some interest in this and took it on before he was an attorney.

Aside from it being an invitation to litigation, for us to go to patent to prepare it, to submit it to Interior, well, it costs about $350,000, because Interior wants us to resurvey it because the survey standards have been changed and so there is a different meridian.

And you have to find a Cadastral surveyor. I do not know if you even know what a Cadastral surveyor is or how you become one, but they sure make a lot of money. This is a very complicated process.

The question is, I suppose, did we abandon these? What is the story? We have never abandoned the claims. Whenever any governmental agencies publish requirements concerning what is necessary to maintain the validity of the claims, my grandfather, my father or I have met these requirements.

The claims were located and filed legally. Subsequent assessment work was performed. In fact, the guy who canceled the claims in the late twenties, the Interior inspector, said that my grandfather's claims were the finest assessment work that he found in Colorado.

My grandfather, not only did he do that, but then when he was given the opportunity to sell the claims, he declined. I have declined to sell the claims. I want to work them.

We paid property taxes to Garfield County for the last 19 years. We have complied with the filing requirements for the Federal Land Policy Management Act in 1976, and believe me, that was an enormous effort to do that. I mean, just to know about it was an enormous effort, much less to fulfil those commitments.

We have resumed assessment work after the decisions of Hickel versus TOSCO. We have been serious about working and developing the claims.

And in spite of this record of compliance, we find S. 2089 particularly objectionable because it gives us no opportunity to comply with the law to keep our claims valid. We want to keep our claims valid, and as I see it what S. 2089 is doing is they are saying, well, the real stamp of validity suddenly became patenting.

Well, Mr. Leshy did not say that that was the standard for validity. Our claims are valid, and why are you changing the standards on us? That would be, I suppose, our beef.

I have also brought—in terms of whether or not we are serious about development, given the rather limited nature of my funds and what I can bring to bear, I would say that we have done all right.

I brought some oil shale. Actually it is some shale oil. This is the big bottle that people can see, and I brought several vials for Senators on the Committee and for their interested staff members. We keep it in a ziplock bag because it is fairly odorous stuff.

We had a retort. This is shale oil from our claim that we took off out of a Black Curley formation, which is apparently idiosyncratic to our part of the Green River formation in that particular area.

We like to call it sweating oil from rocks, because that is how you get it. And I will tell you, I would have a lot more shale oil to show you if I had clear title or thought that I could ever get clear title to the mineral rights to this land.

In addition, not only do we have this and the retort that produced it, we have also built roads. We have $40,000 worth of roads on our claim, culverts. The farmer can get on it better than ever.

In fact, the guy who now is the surface owner charged us a toll when we were taking a drilling rig on, to go over the road that we built. So that it is not always just the folks who are doing the oil shale are somehow maligning the surface owners.

In fact, the original surface owner of that ranch, his name is Thomas Cuddy. He had a son named Thomas Cuddy, and I worked with that Thomas Cuddy. But the original Thomas Cuddy and my grandfather were colleagues, and in fact it was Tom Cuddy that turned my grandfather on to this land.

And when you get out to this, you see. You wonder how my grandfather and his colleagues ever found it.

So that folks who are on the surface also out there do not necessarily find it objectionable. And the Mr. Cuddy that we dealt with, the young Tom, whos is I think now deceased, was very cooperative in what we did, although his successor, like I say, charged us a toll for our own road.

We have also done core drilling, analysis of the sample cores. We have done geological maps, geological reports, and a special process in the retorting hopefully that will make our shale oil possible as soon as possible with an in situ technique.

I would also like to address the surface issues. I am a member of the Sierra Club. God forbid, I even contribute to Senator Lamm, or Governor Lamm, even though he's not running for anything. I would say I am a friend of the environment.

I do not particularly like oil shale and shale oil because of its potential threat to the environment. Nonetheless, it is a very, very valuable resource. And I hope that it is never used for burning, frankly.

I would like to see it used for other sources—as a source of long chain organic molecules, which unfortunately at this particular part of the development of mankind have been burned, which is rather squandering their use, I think.

I have spent a lot of time on that land and, speaking as a conservationist, I guess I would say if we ever have to give up land for long chain organic molecules, then this land is some I think that we can sacrifice, although I would rather not.

I do not want to sound like I am insensitive to those issues, even just of open space. But to get there, if you go the first way I did, which is out from Los Angeles, you drive for two and a half days through nothing but high desert and open chaparral, with the exception of San Bernardino. After you leave San Bernardino, you go through Salt Lake City or you go through Las Vegas, which some people would say is not much of a site anyway, and through Salt Lake City.

And before you even get to Grand Junction, you turn left, get off the interstate, and you go to the north edge of Fruita, and you drive for about an hour on the county road, and then you drive for another—you leave the county road to get onto the roads then that we built, which are jeep roads.

And you have to go about another hour to get to the top of the claim. And when you get to the top of the claim on our 9,000 acres, there are three small stands of aspen groves that I would say were pleasant, except that the wind always blows—or not always blows. We have never been there when the wind is not blowing, to the extent that you have to squint, and it is cold.

It is a long ways from anywhere, and it is not going to become a ski resort, a condo development, or a—I mean, we get twelve inches a year of precipitation out there. And if you would like, I brought some black and white photographs that we took, which you can look for yourself at what that land looks like.

And again, I do not want to make it sound like, oh well, just because it is not beautiful and scenic, that means we ought to develop it. But the notion—and I can speak for myself now and then I will let everyone else speak.

There have always been surface patents on that land in my lifetime, and my assumption is that, since my grandfather went out there with a guy that had—that was living on the surface at the time and was a colocator, it was never his intent as well to do this in land speculation or real estate.

The reason was to mine the resource and to work the resource. All I want is the mineral rights to it, and as a consequence I have been happy to concede those to the Department of Interior, because basically we never had the surface rights anyway, or never could have gotten them, because there has always been surface patents on them.

So if I were to conclude, which I guess I will, I would like to reassure the Committee that three generations of John Herr's have not been trying to steal anything from the United States. If anything, one might think the opposite were true.

Neither my grandfather, my father, nor I have ever made a cent from the oil shale claims. Yet, each of us has spent substantial amounts of time and money to develop oil shale.

It seems to me, with regard to these three generations of my family, the United States mining law has worked just as it was intended. Money made from mineral resources—that is the money my grandfather made running the ore office in Colorado, where he would be able to—because he saw the good grades of ore that came in, he would get together groups of investors who would then fund the miners to go back and work the claims.

That money, alas, I guess I would say, has been reinvested in developing new mineral resources.

All I am asking here today is that the United States continue to respect the mining law as it has been interpreted by the courts so as not to deny me the opportunity to obtain clear title to my mineral, not surface, rights; and so that I can proceed to develop the resources in a way that will be profitable, not only to the United States, but also to me and the members of my family.

I support the Department of Interior's proposed bill because it gives me a reasonable and fair opportunity to maintain my mineral rights and to clarify my title to them today.

Thank you.

[The prepared statement of Dr. Herr follows:]

April 22, 1988

REMARKS OF JOHN J. HERR, OWNER, AGUILA ENERGY UNPATENTED OIL SHALE CLAIMS

Mr. Chairman, Senators:

I appreciate being asked to appear before this subcommittee regarding the disposition of unpatented oil shale claims. I understand the committee does not want the government to proceed with an inequitable settlement with the claimholders. It is also my understanding that the committee has some serious doubts as to whether the claimholders were ever, or are presently, serious about developing oil shale as an energy resource, or simply using a loophole in the mining law to obtain the surface rights to the property held in the claims. It is these issues that I will try to address.

I am the owner of 64 unpatented oil shale claims. They represent approximately 9,000 acres of land due north of Fruita, Colorado. I would like to tell you a little bit about these claims, which will have to include some family history. My grandfather, who is also named John Herr, left his family farm in Ohio when he was 18 years old to join his older brother in Durango, Colorado. Within five years he was co-owner of the Assay Office. In that capacity he was able to invest his own money and guide the investments of others into developing claims that showed unusual promise for the assay of their ore. By the time he was in his mid-30's, he had made enough money to enter into semi-retirement. He married my grandmother, herself the daughter of a silver mining family.

In 1915, the year before my father, yet another John Herr, was born, my grandfather became interested in oil shale. Instead of going to Long Beach that summer, he began locating and buying claims outside of Fruita, Colorado. He did the same thing the following summer. For the next six summers he worked and improved those claims. In 1922 alone, he spent $125,000 on improvements. When the Department of Interior attempted to cancel those claims in the late 20's, the inspector, Oral Berry, noted that my grandfather's claims had the best assessment work on them of any of the Colorado oil shale claims.

From an equitable point of view, I think it is important to note that my grandfather could have spent his 1922 assessment work money on going to patent for his claims. He didn't. Instead, he improved the resource. My grandfather was not a fool, nor was he ignorant of the mining law. He, like everyone else alive at that time, knew that the federal government could not relocate claims after the enactment of the 1920 Mineral Leasing Act. He, like everyone else at the time, and every judge who has tried the issue over the last half century, believed that his oil shale claims were valid indefinitely, since no one else could jump his claim and the government could not seize his claims because he had complied with all applicable law. Therefore, as he explained to me in the mid-50's, there was no reason to spend money to get the fee simple title to the land when the claim was already valid. The value is in the claim and the oil shale, not in the title. Had my grandfather not put his faith in due process, but rather in an attorney and filing fees, I would not be here today. He would have had the patents since 1923. Better still, had he not put any of the money he made from developing the mineral resources of Colorado back into developing oil shale, he would have died a very rich man. Instead, due largely to the losses from oil shale, compounded by further setbacks in the depression, he lived modestly and continued to work daily until he was in his mid-70's.

It is clear we have never abandoned these claims. Whenever any governmental agency has published requirements concerning what is necessary to maintain the validity of the claims, my grandfather, my father or I have met those requirements. We have paid property taxes to Garfield County for the last 19 years. We have complied with the filing requirements of the Federal Land Policy and Management Act of 1976. We resumed assessment work after the decision of Hickel vs. TOSCO. We have been serious about working and developing the claims.

Today I have brought several vials of shale oil produced from the Black Curley formation on the Black Prince set of claims. I would like to give a vial to each senator to empirically demonstrate that even through I am not a big oil company, nor have I had the financial assistance of a big oil company, I still have been able to sweat oil from rocks. In fact, I may have made more shale oil than some of the major oil companies who have already been granted clear title.

I can also tell you that I would have a lot more shale oil if I had clear title to the mineral rights on my claims. Can you imagine how difficult it is to interest a serious investor when the very resource you are trying to develop is contested by the federal government.

As to the issue of the surface rights, I am not interested. I have never been interested. As long as the claims have been under my stewardship, the surface worth owning has already been patented. My grandfather had as a co-locator, Thomas Cuddy, who had a ranch that overlapped the claims and who was interested in developing the oil shale resource himself. I have worked with his son, also a Tom, in doing some of the early assessment work on the claims in my generation. Speaking as a member of the Sierra Club since my student days in 1970 and cognizant that all open space has an intrinsic beauty and natural purpose, I am hesitant to say that any of the surface is worth owning. From Los Angeles you drive for 2 1/2 days seeing nothing but twenty minutes each of Las Vegas and Salt Lake City, and about 18 hours of empty, high desert and chaparral. Then, before you get to Grand Junction, you make a left and go to the Fruita city limits. From there you drive on a dirt county road for about 40 minutes; then you turn off the county road onto the bottom of the claims and to get to the top of the ridge, it takes another 45 minutes in a 4-wheel drive vehicle. It is a great view from there, except that there is almost always a wind blowing hard enough to make you squint your eyes. Senators, that land is a long, long way from being developed as view condos, country estates or a dude ranch. It's at the end of nowhere. I heard someone say that the committee might be worried that it would be turned into a ski resort. Well, if you can have a ski resort where you only get 12 inches of precipitation, I guess that might be a possibility. I would rather bet on oil shale.

The only reason I would ever want the surface would be to prevent being extorted by the surface owner to cross his property; that already happened to us when we wanted to bring a core-drilling rig over the very expensive road we had built to the top of the ridge. Suddenly, instead of the graciousness which we had enjoyed while we were building the road, we encountered hostility from the surface owner who wanted the road we built to be a toll road where he collected the toll.

In conclusion, I would like to reassure the committee that three generations of John Herrs have not been trying to steal anything from the United States. If anything, one might think the opposite is true. Neither my grandfather, my father, nor I have ever made a cent from the oil shale claims, yet each of us have spent substantial amounts of time and money to develop oil shale. It seems to me that in regard to three generations of my family, the United States' mining law has worked just as it was intended. Money made from mineral resources has been reinvested in developing new mineral resources. All I am asking here today is that the United States continue to respect the mining law as it has been interpreted by the courts so as not to deny me the opportunity to obtain clear title to my mineral, not surface rights, and so that I can proceed to develop the resources in a way that will be profitable not only to the United States, but also, to me and the members of my family. I support the Department of the Interior's proposed bill because it gives me a reasonable and fair opportunity to patent my claims.

Respectfully,

John J. Herr

CORE HOLE DRILLED BY AGUILA

ROAD BUILT BY AGUILA

Senator **Melcher**. Thank you, Dr. Herr.
Mr. Larson.

STATEMENT OF FREDERICK H. LARSON

Mr. **Larson**. Thank you, Senator, for allowing me to be here this morning.

Our family has been involved for three generations in our oil shale project. I have my son Rick with me this morning. I have a book here of the assessment work program that we did in 1971, after it was made clear by the Supreme Court decision that assessment work should be resumed. We would be glad to let you see any of these pictures.

We have a book here of the discoveries on all of our claims, that was prepared at the expense of about $300,000.

I think several issues that I should like to point out: Have oil shale claim holders slept on their rights? I can speak for myself: We have not slept on our rights. I applied for and got our last oil shale patent in 1958 or 1959. In 1961, the Department issued a directive that they were going to put on hold any additional patent applications. So obviously we did not challenge that decision.

Then, like the Savage family, we waited for the litigation that has gone on for 25 years, finally settled by Judge Finesilver, at which time we applied for patents. We assumed that we would be treated the same way everybody else has been treated.

That is the standard in this country: No citizen is treated differently than any other citizen. And that is all we are asking here this morning, is fair treatment.

We are ready to compromise with the Department of the Interior, with the Congress. We want to resolve this problem. You have much better things to do than rehash the oil shale picture that has gone on for 60 or 70 years.

Now, I want to read one paragraph out of my statement, because that puts it in—"As you might expect that we would, we have placed great faith and reliance on the statutory system which was established by Congress and which has been interpreted and refined by the highest court of the land in four separate Supreme Court cases. '

"Now, if you cannot believe in that, what can you believe in in this country? Because of this statutory system and these repeatedly encouraging Supreme Court cases, we have continued to invest time and money on our claims. '

I think that is it in a nutshell. You set the rules, Senator. The Congress set the rules. We have played by those rules, just as these other small people.

We are not big oil. We are small people. And I do not think we should be treated any differently than the people who got patents after the Finesilver decision. That is all we are asking.

We are willing to compromise the surface. All three of us have said: Listen, we do not expect to come out of this scot-free with everything that these other people, but we do think we are entitled to the patents to our oil shale.

We have done a lot of work on oil shale. Some day this country is going to be very glad that some of us pioneer types have stood by the oil shale ship, because one of these days you are going to be able to drive your cars because of oil shale.

And I think President Carter certainly did a marvelous service when he pointed out the need for a domestic supply of oil. Sure, that has died on the vine right now, but the glut of oil is only a temporary thing, Senator.

Do you know how many ships we have got protecting the oil supply in the Persian Gulf right today? We have many, and there are more being added every day.

We are here as pioneers in a new industry that cannot start until the economics are right. But when the economics are right, we will be producing oil shale. That was the original intent of Congress. That is all we want to do, sir.

We want to follow the rules that Congress has laid down. We want to be treated fairly. We are perfectly willing to compromise with you.

We appreciate that you have got a very difficult situation, and I know you are trying to be fair. And that is what we are trying to be. We want to be treated fairly.

And I thank you very much for the opportunity to say that.

[The prepared statement of Mr. Larson follows:]

TESTIMONY OF FREDERICK H. LARSON

Before
THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

April 22, 1988

For more than three generations and for over sixty years, my family has worked on our Utah oil shale project. My father purchased our first oil shale claims in 1927. As a boy, I went with him in his Model T Ford to do assessment work in the Utah high desert foothills. I learned firsthand about placers, claim pits, assessment work carved into rocky soil, and repairing flat Model T tires in blazing heat. As an adult, I took over from my father and actively worked on the shale properties. I purchased additional claims and had core drilling done on the property to delimit the shale deposits. My children, in their turns, have begun to assist me on the project. In 1971, my son Larry performed assessment work just as I did in my time, compiling a record of that work which I have with me this morning. My son Rick, a lawyer, has assisted me with business aspects of our claims and is here with me this morning to assist me with this testimony.

Over the years, we have overseen and performed very substantial assessment work on our claims. The types of work we have done include:

- Road building
- Maintenance and improvement of existing roads
- Core drilling
- Core assaying
- Open pit and underground mining studies
- Geochemical analysis
- Geological analysis
- Project development studies

Does the patent system give land away?

Having done this work, it deeply troubles me to hear it said that oil shale claimholders are attempting to obtain federal land for "$2.50 an acre" through the existing patent system. The implication is that federal lands are, essentially, being given away. It seems to me that this reflects a grave misunderstanding. We did not obtain our Utah oil shale claims for free. My family paid hard-won United States dollars for them. The assessment work we have performed over the years was not performed for free. It was performed—quite literally—by the sweat of the brows of my father, of myself and of my children. In addition to the work which we performed with our own hands, we have seen to it that *hundreds of thousands of dollars* have been spent developing these claims over the past sixty years. We have not done this idly. Throughout these long years, we have pursued our work anxiously awaiting the day when we could economically develop this resource and begin recovery of our investment.

I feel that it is centrally important to see that the United States mineral patent system does not and has never represented some kind of a "land grab." The system was designed to induce industrious U.S. citizens to locate and to attempt to develop mineral deposits, and to do these two difficult things at their own private expense. It has certainly had that effect. Now that my family has already invested these many years and dollars, we are deeply distressed at the prospect of having the rules fundamentally changed in mid-stream.

Have oil shale claimholders slept on their rights for 68 years?

The Report of the House Committee on Interior and Insular Affairs on H.R. 1039 makes the statement that oil shale claimholders have had "ample opportunity to apply for patents over that last 66 years but have failed to take such action." I am concerned that this Committee may take a similar view regarding S. 2089. A person who has been *actually involved* with the patent system for these decades will instantly feel uncomfortable with such a statement. This discomfort is caused by the fact that the statement may be true on one level, but the implication—that there has been inappropriate delay or that claimholders have not been diligent—is flatly false.

It would be inappropriate to penalize citizens for actions which the Government has freely permitted by statute and openly encouraged by regulatory practice. Oil shale claimholders have been both permitted and encouraged to postpone filing for patents. The statutes applicable to patenting oil shale claims have never contained an application time limit. National policy, as reflected by these statutes, has been to permit claimholders to decide when and whether to file. Further, the Department of the Interior has imposed openly announced and lengthy moratoriums on processing of oil shale patent applications.

To illustrate, I have personally taken many of our claims to patent over the years. In 1959, I obtained what I understand was the last oil shale patent issued by the Department of the Interior for *twenty-five years*. This lapse of time did not happen because there were no interested claimholders during the hiatus—I and others were keenly interested. It happened because Interior decided and publicly announced that it would issue no more oil shale patents until it had reevaluated its stance on the matter. It was only a lawsuit initiated by frustrated claimants that broke that administrative log jam in 1985. Those twenty-five years of delay did occur, of course, but they had nothing whatever to do with claimholder indolence. Claimholders should not now be faulted for a suspension of activity imposed by the Government itself.

Speaking frankly, delay in filing has also been caused by the fact that filing a patent application has been the near-equivalent of picking a fight with the Department of the Interior. As you all know, oil shale patent applications are often followed by court battles which are costly beyond the means of many claimants, like myself. As I have said, I have taken many of our claims to patent. Applications are presently pending on all of my unpatented claims. However, to avoid immediate crushing expense, in the past I have sometimes waited to apply. No businessman wants to litigate before it is required. I wish to reiterate that National policy has supported me in this quite rational decision to wait. I should not now be penalized for doing what the Nation's statutes were designed to permit, and what the Department of the Interior has actually encouraged.

Have claimants failed to develop oil shale as intended by Congress?

It has been said that "Congress never intended that oil shale lands remain undeveloped for over 67 years." Of course, I do not actually know what members of Congress contemplated in 1920, but I concur that this statement is likely correct. I *do* know—firsthand—that oil shale claimants and patentholders like myself *never* intended for oil shale development to take as long as it has taken. My family has long years of attention and labor and many dollars invested in this resource. We want to see oil extraction and sales begin at the very *instant* that economics will support this. However, the timing of development of oil shale has little or nothing to do with my intent or even the intent of Congress. It has to do with dollars and cents.

Citizens in a market economy don't intentionally operate at a loss. As far as I know, no one involved, including Congress, has ever expected that oil shale would be developed when it would be unprofitable to do it. If I employed present extraction technology to begin oil production from shale tomorrow, I would promptly lose my shirt. Economics is the reason oil shale is not heavily exploited today. Certainly, the obstacle is *not* reticence among parties who have dollars invested awaiting an economic return!

Have the Courts supported the patent system?

The major Supreme Court cases defining and exploring the rights of oil shale claimants have all led me to understand that my claims meet the guidelines followed by the Department of the Interior and can be patented. These major cases include:

- *Wilbur v. Kruschnic*[1], decided in 1930.
- *Ickes v. Virginia-Colorado Development Corporation*[2], decided in 1935.
- *Hickel v. Oil Shale Corporation*[3], decided in 1970.
- *Andrus v. Shell Oil Company*[4], decided in 1980.

A quite recent ruling on oil shale claimant's rights by District Court Judge Sherman G. Finesilver[5] once again reaffirmed my understanding that our oil shale claims could be patented. As a result of Judge Finesilver's decision, a number of claims similar to mine were quite recently taken to patent.

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[1] *Wilbur v. Kruschnic*, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930).

[2] *Ickes v. Virginia-Colorado Development Corporation*, 295 U.S. 639, 55 L.Ed. 1627 (1935).

[3] *Hickel v. Oil Shale Corporation*, 400 U.S. 48, 91 S.Ct. 196, 27 L.Ed. 193 (1970).

[4] *Andrus v. Shell Oil Company*, 446 U.S. 657, 100 S.Ct. 1932, 64 L.Ed. 593 (1980).

[5] *TOSCO Corporation v Hodel*, 611 F.Supp. 1130 (U.S.D.C., D. Colorado, 1985).

As you might expect that we would, we have placed great faith and reliance in this statutory system which was established by Congress and which has been interpreted and refined by the highest Court in the Land. Because of this statutory system and these repeatedly encouraging Supreme Court cases, we have continued to invest time and money on our claims.

Conclusion

Throughout our long years of involvement in Utah oil shale, we have done everything possible to develop the commercial value of oil shale and make it an energy resource for the nation. My strong belief is that our nation's welfare, indeed its survival, is dependent on a domestic energy source. Oil Shale is such a source. However, before oil shale is ready for use by the nation, additional costly research and development work must by performed, and oil shale claims must be patented so that capital can be obtained and invested on secure, titled properties.

Since the turn of the century, the policy of our government has been to encourage private individuals and companies to prospect for, to discover, and to develop the energy resources of the nation. That is what I have attempted to do. I have followed the rules. I have done my part. I am now genuinely fearful that Congress may attempt to nullify more than sixty years of effort and substantial expenditures of money by changing the rules while the players are still on the field.

The Department of the Interior has issued at least 564 patents on oil shale claims similar to mine. I ask that I be treated as others who have been similarly situated. I ask that Congress continue to respect the statutory pact it made with me to spur my efforts and the efforts of my family. I ask that Congress take no steps to destroy or diminish the property rights of those who hold valid oil shale claims.

Respectfully Submitted,

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Senator **Melcher**. Thank you, Mr. Larson.

I have some questions of each of you. It seems to be an unusual panel of varied American interests.

First of all, for you, Mr. Brannigan. Since Marathon has, I guess you could best describe it as, done a lot of research work on possible development of shale for oil, what is your prevailing line of research now for possible development, since you have been at it for 30 years?

Mr. **Brannigan**. Most of the thrust that we have had in the research, Senator, has involved mainly in retorting recovery, and of course upgrading of the shale oil product by hydrogenation and other activities.

Senator **Melcher**. When you say "retorting," you are going to have to bear with me, a novice. What does that mean?

Mr. **Brannigan**. In the karigen of the oil shale, to get the liquid from it, it has to be heated to something like 950 degrees Fahrenheit.

Senator **Melcher**. Is this a process—how do you get the shale? Do you just scoop it up?

Mr. **Brannigan**. It depends on the activities that you are in. In the two-pilot, like the CB, Occidental, of course, it was to be mined underground, partially mined underground, partially the rock was to be broken up and kind of retorted in place with an in situ combustion.

Senator **Melcher**. In situ?

Mr. **Brannigan**. Yes. In other words, the heat was going to be passed over the rubblized rock and collect at the bottom as oil shale in place, in situ.

Senator **Melcher**. And then it is mined?

Mr. **Brannigan**. It is partially mined and partially cooked in the ground.

Senator **Melcher**. I understand that. But after you have cooked it in the ground?

Mr. **Brannigan**. Then you are taking the liquids out at that particular point.

Senator **Melcher**. I see.

Is the surface disturbed? Is it disturbed minimally?

Mr. **Brannigan**. In the CB case, no. I mean, it was all underground mining. There would be, of course, retorts on the surface for that part of the mining that they had to do. It was about 50–50. 50 percent would be retorted in the ground, 50 percent would be above ground.

Senator **Melcher**. Well, let us take the part you had to mine. You brought it to the surface and heated it and extracted the oil. How much do you have left in volume?

Mr. **Brannigan**. You have actually more volume after the heating than you had to start with. I mean, a cubic foot becomes—even after you take out the barrel of oil or something like that, the cubic feet becomes probably ten percent more in volume.

Senator **Melcher**. What do you do with it?

Mr. **Brannigan**. It depends on the area that you are in and what you are trying to do with it.

Senator **Melcher**. Is it piled up somewhere out there?

Mr. **Brannigan.** I am off on another tangent. I am saying what, to my knowledge, what Occidental was doing. Their experimental work was, of course, to spread it on the ground. And they had—they planted native grasses that were growing on the spent shale.

Senator **Melcher.** It will grow grass?

Mr. **Brannigan.** It will grow the same native grasses that were there.

Senator **Melcher.** Well, with that same process where they mined it, how far down underneath the surface are you mining this?

Mr. **Brannigan.** Again, I am talking about Occidental.

Senator **Melcher.** Did Occidental follow the same procedure that your thrust is now?

Mr. **Brannigan.** I am sorry, sir?

Senator **Melcher.** Did Occidental follow the same procedure as you said the thrust for Marathon now is?

Mr. **Brannigan.** No, the thrust for Marathon has been several ways that we have been attempting on the mining end of the thing, several experimental in situ combustions, and have patents on the in situ, which is similar to what I am saying for Occidental.

The areas where we are looking at and in the areas of the claims that we are asking for, that particular there would be an open pit mine. The disposal plan and the development plan for that area would be to take the spent rock and actually tunnel through the Cathedral Bluffs and deposit it on the west side of Cathedral Bluffs, on some barrel land in there. Again, reclamation of the property.

Senator **Melcher.** Well, returning to your process, what you have done, I think you testified that 4,000 tons of shale——

Mr. **Brannigan.** Yes.

Senator **Melcher.** That you extracted?

Mr. **Brannigan.** We extracted in that first round, extracted about 1500 barrels. Those were in the nature of experimental work to increase the yield from the shale oil by proprietary processes that we had developed.

The second part of that was, of course, to—the liquid from the primary retorting is hydrogen starved. It is very heavy liquid, and then we went through processes to make it a more—and again, patents on the processes—to make it more highly usable, particularly in motor fuels and diesel uses.

Senator **Melcher.** 4,000 tons of shale, after you got through with it what did you do with it? Not the oil, but the refuse.

Mr. **Brannigan.** I think there was a disposal on the Anvil Points there, material that we took back to the research lab, which was again another couple thousand tons, and they were disposed in a landfill east of Denver.

Senator **Melcher.** What would oil have to cost? What would the price have to be?

Mr. **Brannigan.** You can get all kinds of opinions.

Senator **Melcher.** I understand. I just want your opinion.

Mr. **Brannigan.** It would be—in today's dollars, we would probably put it somewhere in the mid-fifties.

Senator **Melcher.** The mid-fifties.

Is it fair to say that you are as far advanced or farther advanced than any other company in the United States?

Mr. **Brannigan**. As far as commercialization of oil shale? No, I would have to say that Union Oil is.

Senator **Melcher**. Where are they operating?

Mr. **Brannigan**. They are in Piceance Basin, in the southern portion of it, and they have a full stage, you know, a full mockup, and have been in production for probably about two years.

Senator **Melcher**. You mentioned the Portland claims. You own, Marathon owns, half of the Portland claims, is that correct?

Mr. **Brannigan**. No. The Portland claims are—what I said, I think, was that we owned about half the surface of the Portland claims.

Senator **Melcher**. Oh, about half the surface of the Portland claims.

I do not know what "the Portland claims" means.

Mr. **Brannigan**. It is just our terminology for six claims that are pending before the Interior Department now, 950 acres.

Senator **Melcher**. You own half the surface already?

Mr. **Brannigan**. That is correct.

Senator **Melcher**. What is it? What does that constitute in acres?

Mr. **Brannigan**. The whole claims are about 950 acres, and I think we own probably about 400 or so surface acres.

Senator **Melcher**. You have more claim than that, do you not, that are involved, seeking to receive a patent?

Mr. **Brannigan**. No, the only—that is our total, what we have. And what we have in application is the total amount of public land that we are talking about. The rest of our lands is private owned.

Senator **Melcher**. I see. So we are talking about 450, 480 acres.

Mr. **Brannigan**. Well, the claims themselves for the oil shale is, I think it is 950 or 960 acres.

Senator **Melcher**. Yes, but you already own half the surface.

Mr. **Brannigan**. Surface, but we are talking about the oil shale part of it.

Senator **Melcher**. The claims themselves.

Mr. **Brannigan**. Yes, are 900 and some acres.

Senator **Melcher**. Well, Mr. Savage, you are talking about three generations of your family having been involved with this. Now, to begin with, let us take—is that your grandfather?

Mr. **Savage**. Yes, sir.

Senator **Melcher**. To begin with, he filed under the 1872 Mining Act, mining law?

Mr. **Savage**. He filed on some claims himself and worked with other groups on others.

Senator **Melcher**. But to begin with, it was under the mining law?

Mr. **Savage**. Yes. We do not hold any claims that date back to my grandfather.

Senator **Melcher**. Oh, you do not? They are not what you are testifying on?

Mr. **Savage**. No. At the time my father got back after World War Two, my grandfather had lost all of his holdings. He essentially started over with other people's claims.

Senator MELCHER. So what you are really talking about is claims after the—what was it, 1920 or 1922——

Mr. SAVAGE. All claims were located by somebody prior to 1920.

Senator MELCHER. Oh, all right.

Mr. SAVAGE. There were no new locations.

Senator MELCHER. So you are talking about claims that were filed under the 1872 mining law.

Mr. SAVAGE. Yes, sir.

Senator MELCHER. It is fair to say that oil shale is a peculiar beast under that 1872 Act, is it not?

Mr. SAVAGE. Oil shale is a different kind of mineral deposit than was probably generally considered by miners and legislators, Congressmen, who passed the 1872 mining law, and what everybody thought about it.

It was really before much thought was given to oil and gas.

Senator MELCHER. Let us just assume there was none.

Mr. SAVAGE. So it is a different kind of mineral deposit. I mean, you can locate oil shale with a pair of binoculars from 50 miles away, as opposed to a gold mining claim, where you have got to get down in the creek and grub it out with a hoe or with a pick.

Senator MELCHER. The 1872 law was really for hard rock minerals.

Mr. SAVAGE. Sure.

Senator MELCHER. And they thought if they got a patent, maybe they got 20 acres.

Mr. SAVAGE. One locator on a placer claim, you get 20 acres. There was also provision for the association placer, which is in essence what oil shale claims are.

Senator MELCHER. And for a time we fumbled around, or Congress fumbled around, with whether oil shale did not fit better in placer mining than hard rock.

Mr. SAVAGE. Yes. It was one of the early hard questions.

Senator MELCHER. Okay. However this evolved—and you would know more about it, probably, how it evolved, than I do. But you come down to one point about notice. But there is something about notice in FLPMA. I know quite a bit about that. I authored that bill and managed it when I was in the House.

And it was my intention, and I think it was carried out in the FLPMA, to address how are we going to get around all these old mining claims? I guess they were in the millions. So I came down on the side, personally came down on the side: Well, let us give everybody a shot at this.

Now, how many years did we give in FLPMA?

Mr. SAVAGE. I am sorry? What was your question?

Senator MELCHER. You filed a notice that you are alive or you are the heir or you owned for some reason the claim. How many years?

Mr. SAVAGE. I think the first filings were due in either '76 or '78. I am not sure.

Senator MELCHER. Well, everyone had the review within a period of years. As I recall, it was three years.

Mr. SAVAGE. You mean how long between when the Act was passed and when you had to make a filing? A couple of years is as close as I could come, Senator.

Senator MELCHER. Well, counsel thinks it is two years. I think it was three years, in effect everybody had three years. I think they struggled to gather up what they had in the way of documentation, and present them.

How much do you think you ought to have on this? Because that is what you are saying, Mr. Savage, you ought to have some notice.

Mr. SAVAGE. I can live with six months, but I would like a couple of years. But we are entitled to some period of time long enough, because, as I say, up until literally weeks ago, there was still litigation pending to not allow any patents to any oil shale claims.

And in fact, your moratorium only just expired a couple of years ago.

Senator MELCHER. I think you gave pretty good practical, honest testimony as to what the effect was on individuals regarding the litigation. But you have got to lean on some law. And granted, it is as fuzzy as it is, since your claims were involved in the 1872 law.

And I mean fuzzy in terms of shale. How does shale fit into the 1872 law, you know?

Mr. SAVAGE. It is like a square peg in a round hole.

Senator MELCHER. It certainly is. But given that everybody's understanding of the 1872 law was that you are going to produce something that would get into commerce and be of use to the nation, I think that is a fair statement. That is what the 1872 law was supposed to do.

Mr. SAVAGE. I agree with you, Senator. But the fact that I cannot produce oil shale today at a profit does not mean I am violating the intent of the 1872 mining law. I think that has been warped since the court decisions in the sixties.

Senator MELCHER. But you have to go from the claims to the patent, and that is where we get hung up, because the patent would not be granted just because there might be some possibility some time in the future of a mineral, whatever mineral, being of use in commerce and therefore we will go ahead and produce it.

That is a distinction between the claim and the patent.

Mr. SAVAGE. There has to be some, as you say, some line in between anybody walking in and saying, I think this mineral will be valuable some day, therefore give it to me, and the present marketability test, which I think steps beyond the bounds, where if it is not valuable today and you cannot show a profit on it you are not entitled to it.

I think the mining law was intended to foster development of minerals, and particularly, I mean, the most important thing to foster was minerals that are not profitable today. You can get a lease with a big bonus on minerals that are profitable today.

What you want people to develop are those things that are not profitable today. You want to have them put their money and effort into trying to make something out of something that is not worth anything today.

Senator MELCHER. I agree with that. I am just making this point, that even when we enacted FLPMA in '76, we said: Okay, you have got a claim; it might be 100 years old and then you still think that you want to hang onto it; go ahead and bring that filing up to date now; we have got to have some knowledge of where there are valid claims.

Mr. Savage. I think FLPMA did a good job of decreasing the number of claims out there on the record.

Senator Melcher. We did not change the 1872 Act that says, if you want a patent, you have got to bring that mineral into production.

Mr. Savage. That is not what the mining law says, Senator.

Senator Melcher. Okay, anoint me, then. What does it say?

Mr. Savage. It says that, you have discovered a mineral that may be mined profitably. You do not have to be mining profitably to get a patent.

Senator Melcher. You do not? Just do the exploration and development work?

Mr. Savage. Yes.

Senator Melcher. And that development work could be of a nature where you left the mineral underground?

Mr. Savage. Yes.

The importance of patents to oil shalers is particularly because of the litigation history. Oil shale claims have been challenged for a long, long time by the government. We cannot mine on an unpatented claim because tomorrow somebody is going to decide we do not have a valid claim again.

Senator Melcher. Well, you are saying that if it were a hard rock mineral that you could leave it sit underground and still get a patent?

Mr. Savage. I mean, you have to show that under the present marketability test, which as I said I do not agree with, but that is the current law for hard rock minerals--you have to show in terms of economic feasibility and geological feasibility studies, that you can mine it at a profit.

You do not have to show that you are actually doing so.

Senator Melcher. Oh, all right. I get your distinction then. My understanding was that you could let the minerals set underground if you wanted to, but you had to demonstrate that they could be mined and mrketed profitably.

Mr. Savage. Yes.

Senator Melcher. And that could be somebody else doing it. But that is a point, and this again is—where does shale fit in, oil shale fit in, because you cannot demonstrate that it could be mined and marketed profitably? So it really does not fit in under the 1872 law.

Mr. Savage. As I said, I do not think the present marketability test is the 1872 mining law. It is a current judicial interpretation of it, but that is not the 1872 mining law, nor how it was administered for many years.

Senator Melcher. Being just a student rather than a judge, I am just accepting what the courts have said.

Mr. Savage. Well, I concede what the courts have said. But the change in the present marketability test in the early sixties was a massive change of operation of the 1872 mining law.

And the people who argued that case essentially were saying: We have done it all wrong for 60 years or 80 years, and that was really the test ever since Castle versus Womble. But I hope they did not believe it, because it was not the truth.

And what the 1980 Shell decision said was—in essence it was a backoff on the present marketability test in the case of oil shale, saying oil shale is a valuable resource, it is a valuable mineral, even though you cannot mine it at a profit today.

And that is why we have been in this business, because, as I say in my statement, if you wanted to take us on a hard year-end financial statement, look at this thing, I would not be in the oil shale business. But we are in it because we are oil shalers.

And maybe our ancestors would have been better off maintaining the shop in Philadelphia than heading West. But that is why we are all back there, because somebody thought it was a good idea to do it and give it a shot.

Senator **MELCHER**. Dr. Herr——

Dr. **HERR**. It sounds like a genetic flaw.

Senator **MELCHER** [continuing]. Your ancestors I guess headed West, too.

Dr. **HERR**. Yes, my grandfather took the train. He ran away from home because his father wanted him to take over the farm, and his mother packed him three days worth of fried chicken.

Senator **MELCHER**. But your testimony says that under your stewardship, the claims under your stewardship, that the surface worth owning has already been patented. And you are talking about 9,000 acres of claims.

Is it about half of the surface over those 9,000 acres of claims that have been patented?

Dr. **HERR**. Well, a lot of my surface is pretty vertical, Senator. So I do not know how you judge it. I can tell you that all of the aspen groves I would like to have a picnic in belong to somebody else. All the land that is flat belongs to somebody.

Everything that you could build a ski resort, a dude ranch—God knows, if you could find somebody who would like to ski on rocks—all of that land has been taken on our claims. So that there is nothing except the resource land, you know—actually, it is interesting because there is very little conflict between the area that you need to develop the resource and the alternative uses, because the ridges are narrow on top.

Senator **MELCHER**. So we are really not talking—we do not know what we are talking about in federal surface?

Dr. **HERR**. We checked that once. It seems to me like it is more a third than a half, 5,000.

Senator **MELCHER**. A third to a half is federal?

Dr. **HERR**. Yes.

Senator **MELCHER**. Under the process of recovery that you have described, and apparently—how would you get—how would you extract oil? How did you extract that oil?

Dr. **HERR**. Well, the way we did it, we dug out—we went to one of the old prospects, dug out about a ton of richer shale, and took it down to Vernal, Utah, where we had a bench retort. And the bench retort was trying to simulate an in situ burn.

And we were there for part of it, and the other part was carried out by—well, anyway, we do not need to go into that. But the long and the short of it is that out of that came several gallons of shale oil, were the proceeds of that retort or came out of that retort.

And if I can, my guess would be what happened with the spent shale is that it is probably in the equipment yard of the fellow where we had the lease on the garage.

Senator **MELCHER**. So the drilling was just to get at the core?

Dr. **HERR**. The core was for drilling, yes. The drilling was for the core, and we did a pick job, a pick and shovel job, on the shale oil.

Senator **MELCHER**. Then you recognize that if you would recover it that way, you would have a lot of surface to deal with?

Dr. **HERR**. Well, actually you can go on our particular property—it is interesting because you can go in from the side. The resource is exposed on the side, so you can actually go in from the side.

Actually, we work with some folks in southern California who have got, in fact in San Bernardino, which is a pretty unlikely place to find an oil shale retort, but there is one there, and a plan that includes being able to go up—basically, it is a plan that accommodates increasingly getting larger and larger and larger in small units that you can attract investors on.

It is a small operation. It is never going to be big. It is sort of like growing grapes, if you will. You can grow a few great grapes and you can make a limited profit and that is okay. But if you want to grow a lot of grapes, then you have got to go into it like Gallo.

We are the small guy in this.

And incidentally, I do not think that we would be in commercial production now, even if we had the title. Economics just are not there, not right now.

Senator **MELCHER**. I am just looking at the proposed Administration bill. Apparently you got it before we did.

Dr. **HERR**. I hope to God, because I had to fly to Denver to have some of this run by me. So I am glad he showed up with something.

What they wanted as I understand it is they wanted to run it by so that they had the support of the people who are the potential litigants. I mean, 70 years of litigation seems like enough.

Senator **MELCHER**. I do not know what they are proposing in there. It is too early. This thing came up yesterday to the Committee staff. I have not even looked at it.

Dr. **HERR**. Basically, it gives us three years to do something and we concede the surface rights.

Senator **MELCHER**. Yes, you concede the surface rights, and I think that is the biggest issue confronting the public, as to how do you let the surface go for $2.50 an acre?

Dr. **HERR**. I think the only reason any of us would want the surface rights is just to prevent what happened to us when we had to pay extortion to use our own road.

Senator **MELCHER**. Well, talk to Mr. Brannigan about how you settle with the surface owners rights to get at oil and gas sites. You will be enlightened, I am sure.

Dr. **HERR**. Unfortunately, we found out how you do it. It is not that great a pleasure to go that way.

Senator **MELCHER**. Or is that out of your bag, Mr. Brannigan?

Mr. **BRANNIGAN**. It is fun.

Senator **MELCHER**. Now, Mr. Larson, how many acres do you actually own patent to?

Mr. **LARSON**. About 3,000.

Senator **MELCHER**. And how many acres of oil shale claims?

Mr. **LARSON**. About 26,000.

Senator Melcher. That would be, out of the 26,000, you actually own the surface on 3,000, I mean?

Mr. Larson. Yes. We have some claims where we do not own the surface. They are owned by a sheepherder.

Senator Melcher. You have 26,000 acres in claims and you own 3,000 acres of surface?

Mr. Larson. Own 3,000 acres of patented claims.

Senator Melcher. You own the surface on some other that overlies your——

Mr. Larson. Yes, sir. We have one situation where a sheepherder owns a ranch over our oil shale claims.

Senator Melcher. How many acres?

Mr. Larson. Probably a thousand.

Senator Melcher. You mean you have got 3,000 patented acres, but you bought the surface to 24,000 or 22,000 other acres?

Mr. Larson. No, sir, that is wrong. We will start with the 3,000 patented acres.

Senator Melcher. Yes.

Mr. Larson. 26,000 unpatented claims. On one of the unpatented areas there is approximately a 1,000 acre ranch.

Senator Melcher. Oh, I see. The rest is 22,000 acres, federal ownership.

Mr. Larson. That is correct, which we are perfectly willing to leave in the federal ownership.

Senator Melcher. Well, that is interesting, because I think it is fair to say that—well, I know it is fair to say that many of us here in Congress were shocked after Judge Finesilver's decision, that that was not appealed, as we thought it would be appealed to the Supreme Court.

And that is, Judge Finesilver found in favor of the plaintiff and against the United States, he found against the United States, in favor of the plaintiff. And many of us here in Congress were shocked that it was not taken to the Supreme Court.

But then I think it is also fair to say that many of us in Congress and the public were rather outraged at the circumstances of selling surface for $2.50 an acre, and that was not realistic.

So I believe that was the biggest motivation, that something has to be done. And if the surface is not involved, I think then it is a different situation.

Mr. Larson. I think that is true, and I think most of us here have stated that we are perfectly willing to give up the surface.

Senator Melcher. Have you all stated that?

Dr. Herr. I certainly am.

Mr. Savage. Yes.

Senator Melcher. Marathon wants 480 acres, I know.

Mr. Brannigan. I think it is the type of mining that has to be done, Senator. I mean, if you are going underground—and I think most leases and so forth in underground mining, you use just exactly the surface that you need to have.

If you do open pit mining, the surface has to be part of the whole scheme of things.

Senator Melcher. What do they do in Canada?

Mr. Brannigan. In the tar sands?

Senator Melcher. Yes.

Mr. Brannigan. Of course, that was all provincial land.

Senator Melcher. Okay.

Mr. Brannigan. And of course, they use big scoops and go through there.

Senator Melcher. It seemed like huge scoops.

Who was involved with that, which company?

Mr. Larson. Sun.

Senator Melcher. That was Sun's venture?

Mr. Savage. Senator, if I could respond briefly to one of your questions. You are concerned about the disposal of oil shale. I feel there may be some concern that spent oil shale is like a product out of a smelter or even the junk ore out of a vein or something.

It is much different. There is essentially no difference between spent shale and the rock that has not been retorted, that fell off the cliff. It is pretty crummy stuff in terms of agriculture. With the right techniques, you can grow pretty good alfalfa.

But you do not have the leaching problems and many of the chemical problems that you have with the normal products of a hard rock mining business.

Senator Melcher. No, I understand that.

Mr. Savage. And in fact, there are a number of places in the oil shale where lightning and other causes have started fires on the cliffs.

Senator Melcher. Yes.

Mr. Savage. And there are substantial areas that have been burned and essentially retorted. And except for a slight change in color, there is no difference between those areas and other parts of the slope that are not.

Senator Melcher. Yes, I understand that.

Strip mine is the only immediate question that comes to mind. If it expands in the process, which with some processes it does, and you end up with a bigger volume than what you started out with after you have processed it, it creates quite a problem in the strip mining operation, I can assure you.

All right, thank you all very much for your testimony.

Mr. Larson. May I say one more thing? Since you are the author of FLPMA, we like that and we like the time that you gave us, whether it is two years or three years. We would take either one.

Senator Melcher. It is three. Well, we are all in agreement now, it is three.

Thank you very much. We may have some questions for the record, and the record will remain open for receipt of questions until close of business next Monday.

The questions, of course, will probaby be directed by the Committee, Committee staff, and mostly of the Department itself. But I wanted to let you all know that and announce it as part of this hearing.

Thank you all very much.

The Subcommittee is adjourned.

[Whereupon, at 1:37 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

RESPONSES TO ADDITIONAL COMMITTEE QUESTIONS

United States Department of the Interior
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAY 13 1988

Honorable John Melcher
Chairman, Subcommittee on Mineral Resources
 Development and Production
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your April 26, 1988, letter transmitting questions from Members of the Subcommittee on Mineral Resources Development and Production relating to the April 22, 1988, hearing on S. 2089, the Oil Shale Mining Claims Conversion Act and H.R. 1039, a bill to amend section 37 of the Mineral Leasing Act of 1920 relating to oil shale claims.

We are pleased to enclose responses to the questions. Please do not hesitate to contact us if you need any additional information.

Your continued efforts to resolve this difficult matter of oil shale mining claims are appreciated.

Sincerely,

James E Cason

Deputy Assistant Secretary
Land and Minerals Management

Enclosures

Question #1:

You know that I have been very critical of the Department's decision to settle the Tosco Corp. v. Hodel case. In my view, that settlement was a very poor bargain for the United States and the U.S. taxpayer. Has the Department now issued all of the patents for claims that were the subject of that litigation?

Answer:

Yes, the last two patents in the settlement agreement were issued on July 8 and 9, 1987

Question #2:

I am interested in getting some idea of how many claimants have come in recently to apply for patents while we are in the process of considering this oil shale legislation. How many oil shale patent applications have been filed since February 5, 1987, the date which is the cut-off contained in S. 2089 and H.R. 1039 for the issuance of oil shale patents?

- Where are these claims located?
- How much acreage in terms of federal mineral rights is involved?
- How much surface acreage is involved (list each federal and non-Federal)?

Answer:

Only three oil shale patent applications have been filed with BLM since February 5, 1987.

Colorado:

COC-48471 filed 4/19/88 by Mt. Logan Company for 6 claims containing 963.32 acres in Garfield County; T. 7 & 8 S., R. 97 W., 6th P.M.

COC-48472 filed 4/19/88 by Orville Altenbern for 9 claims containing 1,320 acres in Rio Blanco & Garfield Counties; T. 4 & 5 S., R. 100 W, 6th P.M.

All acreage appears to be federally owned surface and minerals.

Utah:

U-63241 filed 3/17/88 by Fred Larson for 183 claims containing approximately 29,280 acres in Uintah County; T. 9, 10, 11, & 12 S., R. 24, & 25 E., S.L.M. This application will need to be divided into several separate applications because the claims are not all contiguous - a requirement for claims within a single application.

Because the application still lacks a certificate or abstract of title specific facts concerning ownership are unknown at this time; however, some of the claims under patent application appear to overlie State-owned sections that may or may not have been granted "subject to valid existing rights."

Question #3:

How many oil shale patent applications were pending on February 5, 1987?

- For each of these applications, list applicant's name, application number, location of claims, status of the processing of the application as of February 5, 1987, current status of processing of the application, and mineral rights and surface acreage involved (for surface, list each federal and non-Federal).

Answer:

On February 5, 1987, ten oil shale patent applications were pending:

C-35080 filed 2/19/82 by Harlan and Dorothy Hugg for 7 claims containing 1,120 acres in Garfield County, CO; T. 7 S., R. 99 W., 6th P.M. All surface is federally owned. Status of surface ownership was estimated from a map entitled "Piceance Creek Basin Oil Shale Status", dated February 1981, compiled by the Colorado State Office, Bureau of Land Management. First part final certificate issued 12/18/84.

C-36293 filed 8/24/82 by Harlan and Dorothy Hugg for 13 claims containing 2,080 acres in Garfield County, CO; T. 6 S.,R. 99 W., 6th P.M. Approximately 160 acres are privately owned surface. First part final certificate issued 6/4/85.

C-38579 filed 1/23/84 by Exxon for 20 claims containing 3,203.8 acres in Garfield County, CO; T.4 S., R. 97 W., 6th P.M. Approximately 1,040 acres are privately owned surface. The Solicitor has approved chain-of-title, adverse claims have been published out, and monies paid. Statement of charges and fees is necessary before first part final certificate can issue.

C-39464 (out of C-38402) filed 10/26/83 by Union Oil for 10 claims containing 1,216.14 acres in Garfield County, CO; T. 5 S., R. 96 W., 6th P.M. Approximately 480 acres are privately owned surface. First part final certificate issued 1/11/84.

C-41836 filed 6/11/85 by TOSCO for 12 claims containing 1,880 acres in Garfield County, CO; T. 5 S., R. 99 W., 6th P.M. Approximately 720 acres are privately owned surface. Adverse claims have been published out, chain-of-title has not been reviewed by the Solicitor. TOSCO has not pre-paid monies.

C-43354 filed 4/4/86 by Marathon for 6 claims containing 982.92 acres in Rio Blanco County, CO; T. 1 S., R.99 W., 6th P.M. Approximately 200 acres are State of Colorado-owned surface. Adverse claims published out and monies pre-paid. Chain-of-title not reviewed by the Solicitor.

C-38402 filed 10/26/83 by Union Oil for 4 claims containing 686.84 acres in Garfield County, CO; T. 5 S., R. 96 W., 6th P.M. Approximately 360 acres are privately owned surface. IBLA ruled on 6/3/87 that these claims were invalid as a result of contest actions taken during 1929-32. Patent application was rejected with prejudice. No suit for judicial review has been filed, to the best of our knowledge.

C-012327 filed 9/30/55 by Pacific Oil Co. for 4 claims containing 636.38 acres in Garfield County, CO; T. 6 S., R. 95 W., 6th P.M. Entire acreage was federally owned surface. First part final certificate issued 11/20/61. Part of TOSCO settlement agreement. Patent issued 7/9/87.

C-016671 filed 2/5/57 by Tell Ertl, et al., for 12 claims containing 1,921.12 acres in Rio Blanco County, CO; T. 4 S., R. 95 W., 6th P.M. Approximately 640 acres are private surface. First part final certificate issued 3/28/83. Part of TOSCO settlement agreement. Patent issued 7/8/88.

C-023661 filed 8/7/58 by Frank Winegar for 2 claims containing 319.56 acres in Garfield County, CO; T. 7 S., R. 97 W., 6th P.M. Approximately 120 acres are privately owned surface. First part final certificate issued 11/30/60. Claims contested in 1967 for lack of discovery. Supreme Court ruled in 1980 (Andrus v. Shell Oil) that prospective value was sufficient for patent. Patent issued 6/2/87.

Question #4:

How many oil shale patent applications are currently pending before the Department of the Interior?

- When were each of these patent applications filed?
- For each of these applications, list applicant's name, application number, location of claims, status of the processing of the application, and mineral rights and surface acreage involved (for surface, list each federal and non-Federal).
- Has annual assessment work been completed on these claims each and every year since the claim was located? Please provide this information on an application-by-application basis.
- Were any of these applications subject to the TOSCO settlement agreement? If so, please list.

Answer:

There are nine oil shale patent applications currently pending with BLM:

C-35080 filed 2/19/82 by Harlan and Dorothy Hugg for 7 claims containing 1,120 acres in Garfield County, CO; T. 7 S., R. 99 W., 6th P.M. All surface is federally owned. First part final certificate issued 12/18/84.

C-36293 filed 8/24/82 by Harlan and Dorothy Hugg for 13 claims containing 2,080 acres in Garfield County, CO; T. 6 S.,R. 99 W., 6th P.M. Approximately 160 acres are privately owned surface. First part final certificate issued 6/4/85.

C-38579 filed 1/23/84 by Exxon for 20 claims containing 3,203.8 acres in Garfield County, CO; T.4 S., R. 97 W., 6th P.M. Approximately 1,040 acres are privately owned surface. The Solicitor has approved chain-of-title, adverse claims were published out, and monies paid. Statement of charges and fees necessary before first part final certificate can issue.

C-39464 (out Of C-38402) filed 10/26/83 by Union Oil for 10 claims containing 1,216.14 acres in Garfield County, CO; T. 5 S., R. 96 W., 6th P.M. Approximately 480 acres are privately owned surface. First part final certificate issued 1/11/84.

C-41836 filed 6/11/85 by TOSCO for 12 claims containing 1,880 acres in Garfield County, CO; T. 5 S., R. 99 W., 6th P.M. Approximately 720 acres are privately owned surface. Adverse claims have been published out, chain-of-title has not been reviewed by the Solicitor. Tosco has not pre-paid monies.

C-43354 filed 4/4/86 by Marathon for 6 claims containing 982.92 acres in Rio Blanco County, CO; T. 1 S., R.99 W., 6th P.M. Approximately 200 acres are State of Colorado-owned surface. Adverse claims published out and monies pre-paid. Chain-of-title not reviewed by Solicitor.

COC-48471 filed 4/19/88 by Mt. Logan Company for 6 claims containing 963.32 acres in Garfield County; T. 7 & 8 S., R. 97 W., 6th P.M. All acres are federally owned surface.

COC-48472 filed 4/19/88 by Orville Altenbern for 9 claims containing 1,320 acres in Rio Blanco & Garfield Counties; T. 4 & 5 S., R. 100 W, 6th P.M. All acres are federally owned surface.

U-63241 filed 3/17/88 by Fred Larson for 183 claims containing approximately 29,280 acres in Uintah County; T. 9, 10, 11, & 12 S., R. 24, & 25 E., S.L.M. Because the application still lacks a certificate or abstract of title, specific facts concerning ownership are unknown at this time. However, some of the claims under patent application appear to overlie State-owned sections that may or may not have been granted "subject to valid existing rights."

Patent applications lacking first part final certificate are being adjudicated as time permits.

No field work and mineral report preparation are being conducted now as BLM attempts to reach a consensus with Congress, the affected States, and claimants on the proper discovery standard and definition of substantial compliance with assessment work requirements to apply to these claims.

With respect to assessment work performance, for each and every year since the claims under patent application were located, the Department has no record prior to the establishment of the system mandated by the Federal Land Policy and Management Act of 1976 (FLPMA). Oil shale claimants (and others) were given until October 1979 to record their claims with BLM and to file evidence of annual assessment work performance (or notice of intent to hold) thereafter. Also, the three patent applicants that have received first part final certificate (both Hugg cases and Union Oil) no longer have the obligation to perform annual labor.

In May 1987, BLM checked the FLPMA mining claim recordation system for oil shale claimants that had filed only notices of intent to hold their claims rather than affidavits of assessment work performance. All of the claims now pending patents were found to have filed affidavits of assessment work for at least the last two calendar years. Consequently, because of the statutory principle that resumption of labor bars challenge of one's mining claim, the claims within the nine pending patent applications could not be contested on the basis of past failures in the obligation to annually perform labor or make improvements.

None of the pending applications are subject to the settlement agreement.

Question #5:

Specifically, what guidelines is the Department applying currently with respect to the annual assessment work requirement?

- Are these guidelines written? If so, please provide a copy.

Answer:

The quidelines the Department is following are contained in section 6(2) of our draft bill which requires that oil shale mining claimants establish that:

> There has been substantial compliance with the assessment work requirements of the mining laws, including the minimum annual expenditure of labor and means in an effort to develop a valuable oil shale deposit, without a lapse of two or more years duration unless such lapse was authorized by act of Congress, or there has been resumption of such assessment work after a lapse of two or more years but before initiation of a contest of the oil shale mining claim: Provided, that for any lapse of assessment work after the date of enactment of this Act the resumption of labor prior to the initiation of a contest shall not be a defense against a contest brought on this basis.

The Department is following these guidelines and will implement them through regulation except for the proviso regarding resumption of labor which is presently controlled by the Mining Law of 1872 (30 U.S.C. 28) as interpreted by the Supreme Court in Wilbur v. Krushnic.

Question #6:

Please provide for the record a description of the steps undertaken by the Department in processing an oil shale patent application.

Answer:

Oil shale mining claim patent applications are processed in the same manner as other placer mining claims. Generally, these steps include:

Acceptance of patent application and receipt of filing fee ($25).

Serialization of case file and notation on master title plat.

Review of documents for completeness and request for additional documentation if necessary.

Check of chain-of-title documents to assure that applicant has possessory interest in the mining claims. Regional Solicitor issues title opinion for oil shale claims because of their unusually complex history.

Applicant is directed to publish notice in the local newspaper giving adverse claimants the opportunity to challenge possessory right in local court. After 60 days adverse claims may no longer be initiated.

Applicant pays the statutory price ($2.50/acre or fraction thereof) and receives first part final certificate indicating that the above steps have been completed. That is, BLM agrees by the issuance of this document only that the claims were located at a time when the land was open to the operation of the mining laws, and that possessory title rest with the applicant. At this point BLM is making no decision as to the validity of the mining claimant's rights against the United States.

The patent case file is sent to a BLM (or USFS) field office for preparation of a mineral report that concludes whether or not the claim has a discovery of a valuable mineral deposit within its boundaries. The discovery standard against which a mining claim is measured is a product of administrative and judicial case law handed down since 1872. For oil shale mining claims the discovery standard has been fixed, basically, since 1927 when Secretary Work ruled in Freeman v. Summers. The Department's two-decade attempt to repudiate the Freeman standard of discovery was rebuffed by the Supreme Court in 1980 in Andrus v. Shell Oil.

For oil shale mining claims in particular (though the regulation applies to all locatable minerals) BLM will inquire into "substantial compliance" with the performance of assessment work when determining the validity of a claim.

If an approved mineral report concludes that a claim is valid, the report will contain a recommendation to "clear list" the claim for patent. If the report concludes the claim is invalid, it will contain a recommendation to initiate a contest and suggest charges for the complaint.

If the claim is to be patented the second part of the final certificate will be completed and signed. This document immediately precedes issuance of the actual patent and lists the exceptions and reservations to be included in the patent.

Question #7:

The Department's draft legislation requires that there be "substantial compliance" with the annual assessment work requirement of the 1872 Mining Law as a prerequisite to obtaining a patent. How would you expect this standard to be interpreted?

Answer:

Section 6(2) of the Department's draft legislation defines substantial compliance as follows:

> There has been substantial compliance with the assessment work requirements of the mining laws, including the minimum annual expenditure of labor and means in an effort to develop a valuable oil shale deposit, without a lapse of two or more years duration unless such lapse was authorized by act of Congress, or there has been resumption of such assessment work after a lapse of two or more years but before initiation of a contest of the oil shale mining claim: Provided, that for any lapse of assessment work after the date of enactment of this Act the resumption of labor prior to the initiation of a contest shall not be a defense against a contest brought on this basis.

If our draft substitute bill were enacted into law, the prospective application of the statutory right of resumption would no longer apply and the Department would be free to contest claims on the basis of alleged failure to perform labor thereafter. Retrospectively, of course, the statutory right would continue to bar contests for alleged failures in the past that have been cured through resumption of assessment work.

Question #8:

I note that your draft bill would allow patents to be issued even where there had been lapses in annual assessment work of two or more years so long as work was resumed prior to the initiation of a contest proceeding.

- Am I correct in understanding that this could allow the patenting of claims where annual assessment work was not done for extended periods of say 20 or 30 years, so long as the work was resumed before the Department got around to contesting the claim?
- If so, how can this be justified?

Answer:

You are correct in your understanding.

It is justified by the decisions of the Supreme Court in Wilbur v. Krushnic and Ickes v. Virginia-Colorado Development Corp. These rulings prompted Secretary Ickes to issue The Shale Oil Co. decision in 1935 that formally renounced the Department's use of assessment work lapses to void mining claims.

Congress has had ample opportunity to reverse the interpretation of the courts on this issue by enacting legislation to clarify the resumption principle of 30 U.S.C. § 28, but has not done so. Instead, Congress has on many occasions suspended the obligation to perform assessment work. During the Great Depression several suspension statutes were enacted. Likewise, during World War II and the Korean Conflict suspension statutes were passed because able-bodied men were generally unavailable to perform the labor. Thus, oil shale claimants (indeed, all mining claimants) from 1935 to 1970 were cognizant that judicial and administrative decisions protected them from challenge by the Government for assessment work lapses, and that the Congress had acquiesced in this position.

With the Hickel v. TOSCO decision in 1970 oil shale mining claimants were aware that the Government could now rightfully inquire into their performance of assessment work prospectively, and that they must perform such labor or risk contest of their claims while in default of their obligations. The mining claim recordation required by section 314 of FLPMA disclosed that the vast majority of oil shale claimants (all but two - Geokinetics, Inc. and the Estate of Doris Flynn) have attested to such compliance by annually filing affidavits of assessment work.

Question #9:

In response to questions previously submitted to the Department by this Subcommittee, you indicated that you intend to issue draft regulations in the spring of 1988 that propose a standard for discovery and a standard for substantial compliance with assessment work requirements. What is the status of these draft regulations?

Answer:

The draft regulations are still under review within the Department. The draft regulation defining discovery of a valuable oil shale deposit within the meaning of the mining laws (proposed for 43 CFR 3842.4 Petroleum placers) is the same as section 6 (a) of our bill.

The rulemaking proposed to clarify the meaning of the requirements for substantial compliance with assessment work (43 CFR 3851.3 [a]) is necessarily limited to what the Department recognizes as current case law. In other words, by regulation we may not ignore the prospective application of the resumption principle handed down by the Supreme Court, although we urge the Congress to remove this limitation on our authority by enactment of our bill.

Question #10:

In order to produce oil shale, what surface disturbance is likely to occur?

What waste products are produced?

How are these waste products disposed of?

On a given oil shale claim, what percentage of the overlying surface is likely to be affected by oil shale development?

Answer:

Shale oil production can be achieved either by:

(1) surface retorting of oil shale deposits deepmined and hoisted to the surface through vertical (or inclined) shafts or through horizontal haulageways (adits) to cliffside portals, or by stripmining of shallow deposits and transportation to retorting facilities, or

(2) in situ retorting of oil shale at depth by various methods ranging from direct combustion of a portion of the contained kerogen to fuel the process to application of microwave energy to the subsurface to induce flowage of crude shale oil to wells.

The extent of surface disturbance will vary dramatically depending on the mining and recovery methods chosen. Stripmining could easily disturb the entire 160 acres of the typical oil shale placer mining claim, but is feasible only for near surface deposits such as those near the western margin of the Piceance basin in Colorado, known as the Cathedral Bluffs. Surface retorting of underground-mined oil shale deposits will still create spent shale that must be disposed of either underground and/or on the surface. In situ retorting would create the least surface disturbance.

The primary waste product of shale oil production will be spent shale, i.e., the marlstone (oil shale) after it has been heated to recover its kerogen content. Spent shale occupies a greater volume than the ore, so aboveground storage in spoil piles will be necessary. The US Geological Survey in Professional Paper 1310 entitled "Oil Shale, Water Resources, and Valuable Minerals of the Piceance Basin, Colorado: the Challenge and Choices of Development" reports (p.103) that dissolved solids, molybdenum, fluoride, and boron are the major inorganic contaminants in leachate from oil shale.

Disposal of spent shale will require stringent reclamation measures to insure stability of the spoil piles, control migration of soluble salts, and promote establishment of vegetative cover. The technical details of how spent shale must be disposed have been addressed in leasing documents such as the detailed development plan, and modification thereto, to the C-b oil shale project prepared by Ashland Oil, Inc., and Occidental Oil Shale, Inc., in 1976 and 1977 respectively.

There simply is no way to say what percentage of overlying surface is likely to be affected by oil shale development on any given claim unless and until a detailed plan of operations is drafted.

Question #11:

Section 7 (b) of the Department's proposed bill provides an exemption to the United States for liability under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) resulting from surface uses for oil shale development. What is the rationale for this?

Answer:

Mine wastes, *per se*, are currently unregulated under the provisions of either subtitles D or C of RCRA, pending the final outcome of an Environmental Protection Agency effort to develop a proper regulatory framework using RCRA authorities. Under CERCLA, toxic or hazardous constituents of mine waste that are released in reportable quantities are subject to enforcement actions. Under RCRA regulations, landowners are jointly liable for the actions of the RCRA permittee. In CERCLA actions, landowners are liable for the actions of operators.

Once the oil shale estate is patented the Government's role as surface estate owner becomes that of a passive landowner with joint liability for the actions of the oil shale patentees. Because RCRA/CERCLA liability rules ensure that all cleanup costs must be paid for, the United States could, in effect, subsidize the activities of the oil shale patentees that violate these substantive environmental laws, unless the Government is exempted by statute.

We do not believe that it is appropriate for the taxpayers to assume the costs which should be those of private parties. If defaulting entities are unable to finance the cleanup, we recognize that the Federal Government, as land manager, may have to take action. We believe there is a significant possibility that the Federal Government would assume some liability that would have to be financed by the appropriations process. If cleanup is subject to RCRA/CERCLA, then it will likely be driven by court-imposed deadlines without regard to other priority needs.

PROF. PATRICK C. McGINLEY
West Virginia University
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(304) 293-5301

May 6, 1988

Honorable John Melcher
United States Senate
Subcommittee on Mineral Resources Development and Production
Washington, D. C. 20510 - 6150

Dear Senator Melcher:

You have requested that I supplement my April 22, 1988 testimony on S. 2089 by answering several additional questions. I have responded to these questions below.

1. Does the Property Clause of the Constitution figure into your analysis of the constitutionality of S. 2089? If so, how?

The Property Clause of the Constitution (Article III, Sec 3) in relevant part provides:

> The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...

The Supreme Court's view of congressional power vested in Congress by the Property Clause has been expansive. In *Kleppe v. New Mexico*, 426 U.S. 529(1976), the Court emphasized that:

> ...the clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands... And while the furthest reaches of the power granted by the Property Clause have not been definitely resolved, we have repeatedly observed "(t)he power over

the public lands thus entrusted to Congress is without limitations." 426 U.S. 529, 539, (1976). See also Comfield vs. United States, 167 U.S. 518,(1897).

Moreover in Kleppe, the court noted that, with regard to the public lands, "Congress exercises the powers of both a proprietor and of a legislature over the public domain."Id. at 540.

Acting in the role of proprietor, Congress in 1872, opened public lands to mining claims. With the right to locate claims on such land and the right to subsequently conduct mining operations thereon, was attached an option extended to the claimant to patent the land. Claimants have had decades to exercise this option and have chosen not to do so. The proffered option was an exercise of public largesse that mining claimants had total discretion to accept or reject. These holders of mining claims have been dealing with the United States which has been acting in its proprietary capacity.

When viewed in this light, the position of the unpatented mining claimant appears in clear focus. The landowner (The United States) extended an option to secure a patent (fee simple) to the claimant. An exercise of the option was not crucial (nor for that matter relevant), to the purpose underlying the claim--extraction of oil shale. An owner (proprietor) of real estate is not obliged to forever hold open an option to transfer title to real property. After a reasonable time such an offer may be terminated. In the case of oil shale claimants who chose to ignore this extremely generous option, their decision not to exercise the option to patent for more than sixty years allows the proprietor of the land to withdraw the option.

Under well established principles of contract law, an option to buy real property that contains no expiration date must be held open for a reasonable time. Any objective person who reviews the withdrawal of the patent claimant's option, an option held open for more than half of a century, must conclude that the time extended by the United States has been eminently reasonable.

The "taking" clause of the Fifth Amendment does not afford oil shale claimants rights greater than they would have if such an option to acquire real estate were extended by a private party.

Thus the status of the United States as *proprietor* of public lands under Article IV strongly supports my view that neither S. 2089 nor H.R. 1039 effects an unconstitutional taking of oil shale claimants' property.

2. Under both S. 2089 and H. R. 1039, claimants must have submitted a patent application by February 5, 1987, in order to be eligible to obtain a patent. In your view, does Congress have the authority to impose such a cut-off in order to prevent a change in the status quo, in this case a rush to make applications, during Congressional consideration of legislation? In your view, is February 5, 1987, the date H. R. 1039 was introduced in the House of Representatives, an appropriate cut-

off date from a legal standpoint?

Congress acting as proprietor of public lands of the United States is empowered both to extend an option to patent federal lands to oil shale claimants and also to withdraw such unexercised option after passage of a reasonable time. This power exists, notwithstanding a perceived need to prevent a change in the status quo during consideration of the instant legislation. After holding open the option to patent oil shale claims for more than half a century, Congress is empowered to withdraw the option at any time. February 5, 1987, is as appropriate a time as any to withdraw the option to patent.

3. The witness representing the Department of the Interior was critical of the court's holding in *Freese vs. United States*, 639 F. 2d 754 (Ct. Cl. 1981), *cert denied*, 454 U.S. 827. Do you believe the court's reasoning in that opinion is sound?

Fresse vs. United States was decided by a unanimous Court of Claims. The Supreme Court of the United States denied the mineral claimants' petition for a writ of certiorari. The *Freese* decision relies on sound Supreme Court precedent.

Under the circumstances, criticism of *Freese*, by the Department of the Interior witness, should be viewed in light of the witness's own disclaimer at the beginning of his testimony-- he is not a lawyer and does not profess to be one. In my view _Freese_ was a sound decision.

I appreciate the opportunity to comment further on S. 2089 and H.R. 1039.

Very truly yours,

Patrick C. McGinley

Patrick C. McGinley
Professor of Law

John D. Leshy
Professor of Law
Arizona State University
Tempe, AZ 85727

May 5, 1988

The Honorable John Melcher
Chairman, Subcommittee on Mineral
  Resources Development and Protection
Committee on Energy and Natural Resources
United States Senate
Washington DC 20510-6150

Dear Senator Melcher:

In response to your letter of April 26 transmitting additional questions regarding S. 2089 and H.R. 1039, I offer the following:

1. Does the Property Clause of the Constitution figure into your analysis of the constitutionality of S. 2089, and if so, how?

In my view, the constitutionality of S. 2089 is assured without regard to any special powers the Congress has under the Property Clause of the Constitution. The bill's restrictions on whatever property rights might exist in oil shale mining claims are fully justified as an exercise of Congress' other constitutional powers. For example, Congress' regulatory power under the commerce clause permits it to substantially diminish the value of private property interests, yet the courts have had no difficulty sustaining such actions against "takings" attacks. See, e.g., Hodel v. Indiana, 452 U.S. 314, 333-35 (1981) (upholding the constitutionality of the Surface Mining Control and Reclamation Act of 1977). The Supreme Court has also made clear, in the specific context of dormant mineral rights, that statutes extinguishing private property rights for failure to perform certain acts pose no takings problems. See, e.g., Texaco v. Short, 454 U.S. 516 (1984).

The fact that these oil shale mining claims are (to the extent they are valid) constitutionally protected private interests in federal property can only strengthen the already quite clearcut case for constitutionality. The Supreme Court has made clear in numerous cases dating back a century and a half that the power of Congress over federal property is essentially "without limitations." See, e.g., United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940). Even conceding that the fifth amendment's protection for private property puts some limit on Congress' power over federal property, there is no doubt that the property clause power adds force to the argument for S. 2089's constitutionality. See, e.g., United States v. Locke, 471 U.S. 84, 104 (1985) (Congress' power is "particularly broad" with respect to unpatented mining claims).

Nevertheless, whatever extra oomph the property clause furnishes Congress' regulatory power here is not crucial, because the constitutionality of S. 2089 would be clear even if federal property were not involved. The fact that the United States still retains title to the land covered by these oil shale claims simply makes an already plain case of constitutionality even more unassailable.

2. Is a legislatively determined cutoff date for patent applications constitutional, and if so, is the February 5, 1987 date defensible?

The patent feature of the Mining Law is not a core property right. It is, rather, a mere frill, and therefore Congress could eliminate it at any time prior to the actual issuance of a patent, so long as some reasonable opportunity remains available to mine the claim. Stated another way, the claimant's basic, constitutionally protected property interest is that opportunity to mine, and S. 2089's closing off the patent option, no matter how abrupt or retroactive, does not interfere with that opportunity. As the Court of Claims observed in the Freese case, no right to a patent under the Mining Law comes into existence "until there has been full compliance with the extensive procedures set forth in the federal mining laws for the obtaining of a patent." 639 F.2d 754, 758 (Ct. Cl. 1981) (citing two opinions of the Supreme Court).

3. Was the Court of Claims' reasoning in Freese v. United States sound?

I was somewhat startled by the government witness's suggestion that Freese was a questionable decision. I ascribe it primarily to the fact that the witness was not a lawyer, and was, as he admitted, not fully conversant with the substantial judicial teachings on the question of takings. As far as I am aware, no judge or scholar has ever questioned the correctness of this decision.

Several features of the Freese decision bear special mention here. First, the government was the defendant in that case, and argued vigorously in defense of Congress' action in terminating the right to patent mining claims in the Sawtooth National Recreation Area. To the extent the government is now questioning the decision, it is questioning a result it had previously asked the Court to reach.

Second, the Court in Freese disposed of the issue on summary judgment. In technical legal terms, this means that the Court did not believe the issue raised by the claimant deserved a full trial on the merits. It did not want to hear evidence on the extent to which the claimant's operation might be curtailed, or how much investment he had in his operation, or what kind of profit he might lose from being deprived of the opportunity to patent his claim. Instead it asked only a bare legal question - did the deprivation of the patent opportunity unconstitutionally deprive him of a valuable property right? - and firmly answered it in the negative.

Third, the Court that rendered the decision, the Court of Claims, is not a babe in the woods when it comes to deciding whether acts of Congress have unconstitutionally "taken" private property interests. It decides dozens of such cases every year by written opinion. Yet it did not regard the issue in Freese as particularly difficult; on the contrary, it disposed of it easily, even curtly.

What else can one make of the brevity of the opinion, the fact that it was unanimous, and especially the language the Court used? The Court said that plaintiff's contention (that as the holder of an existing mining claim he had a right to patent) has "no merit. There is no maintainable legal theory in support of his view that he has suffered a deprivation of 'private property' as that term is used in the fifth amendment." 639 F.2d 754, 757 (emphasis added). The Court did not say that the claimant had a decent argument that, on balance, must be rejected because the public interest was stronger on the other side. Instead, the Court said there is no credible theory supporting his argument. Similarly, a few paragraphs later the Court relied on "common sense" to dispose of the notion that the claimant had suffered a taking. This is not the kind of language a court uses when it is troubled by a legal issue.

It should also be noted that the Court of Claims is just one rung below the Supreme Court - the equivalent of the Circuit Courts of Appeals - and that, finally, the claimant in Freese asked the Supreme Court to review the decision but it declined to do so.

As I pointed out in my statement of April 22, another decision, the Alaska Miners case out of the Ninth Circuit Court of Appeals, reached a similar result on a closely, but not precisely analogous issue. Its opinion was likewise brief and disparaging of the claimants' arguments, using phrases like "[w]e find it unnecessary to discuss in detail the many cases" in opposition to the claimants. See 662 F.2d 577, 579.

No decisions casting doubt on these results exist in any even remotely analogous context. The fact that there are such few decisions is primarily, in my judgment, because no other mining claimants who have faced denials of patents because of previous congressional actions like S. 2089 have bothered to pursue the practically hopeless quest of persuading a court that a constitutional violation exists. And genuine miners engaged in actual mineral development are not affected by the loss of patent opportunity, and are therefore indifferent to it.

That is the real message of Freese and Alaska Miners; that the constitutional question borders on the frivolous, and does not require extensive discussion. To paraphrase the language the Court of Claims used in Freese, like the Sawtooth Act, S. 2089 merely "narrows somewhat the claimants' opportunities," but this is far short of depriving the claimant of a constitutional right. See 639 F.2d at 755.

As I indicated in my testimony on April 22, it is time, more than 68 years after adoption of the Mineral Leasing Act, to bring this saga of grandfathered mining claims to a conclusion. S. 2089 is a reasonable compromise solution, giving these claimants an additional ten or twenty years to bring their claims into production or lose them. Any property rights the claimants have in these claims are bottomed solely on the opportunity to mine, and that opportunity is not deprived of them by S. 2089. For that reason, I see no serious constitutional problem with S. 2089 or its House counterpart, H.R. 1039.

Sincerely,

John Leshy

John D. Leshy
Professor of Law

Working for the Nature of Tomorrow.
NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

May 9, 1988

The Honorable John Melcher
Chairman
Senate Subcommittee on Mineral Resources
Development and Production
United States Senate
Washington, D.C. 20510

Dear Chairman Melcher:

This is in response to your letter of April 26, 1988, submitting additional questions for the record of the Subcommittee's hearing on S. 2089 and H.R. 1039. I hope that my answers will be of assistance to the Subcommittee in considering this legislation.

1. DOES THE PROPERTY CLAUSE OF THE CONSTITUTION FIGURE INTO YOUR ANALYSIS OF THE CONSTITUTIONALITY OF S. 2089? IF SO, HOW?

Yes. Under Article IV of the Constitution, the power of Congress over lands of the United States wherever situated is exclusive and plenary. The property of the United States is thus held in trust for its citizens and no rights whatsoever can be obtained in these lands except as Congress may consent.

The power to qualify existing property rights is therefore particularly broad with respect to mining claims. As the Supreme Court stated in *United States v. Locke*, 105 S. Ct. 1785, 1798 (1985), the property right held by a mining claimant is only the right to a flow of income from production of the claim. The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used or acquired by mining claimants. *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). It is this power which Congress will be exercising in adopting S. 2089.

2. IN YOUR VIEW, IS FEBRUARY 5, 1987, THE DATE H.R. 1039 WAS INTRODUCED IN THE HOUSE OF REPRESENTATIVES, AN APPROPRIATE CUT-OFF DATE FROM A LEGAL STANDPOINT?

Yes. The Supreme Court repeatedly has upheld statutes which apply retroactively when the purpose of such measures was to prevent those whose interests may be affected by the legislation from taking advantage of the time required for congressional action. See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984). Congress clearly is entitled to protect its power to legislate, as well as its duty under Article IV to maintain public property, by the use of cut-off dates to preserve the status quo during its deliberations. As the Supreme Court noted in Pension Benefit Guaranty Corp., this is the customary congressional practice and the Court is "loath" to overturn it.

3. DO YOU BELIEVE THE COURT'S REASONING IN [FREESE V. UNITED STATES] IS SOUND?

Yes. In his oral remarks, the witness for the Department of the Interior suggested two criticisms of the United States Claims Court's opinion in Freese v. United States, 639 F.2d 754 (Ct. Cl. 1981):

1. it is a "lower court" opinion, and
2. the opinion itself is "unsound."

Neither of these criticisms is supported in the Department's written testimony. Neither of these criticisms is credible. (See attached memorandum prepared by the Congressional Research Service in response to the legal analysis submitted on behalf of the law firm of Patton, Boggs & Blow.)

First, the United States Claims Court, under 28 U.S.C. §1491, is granted special jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress...." In other words, should the current oil shale claimants choose to challenge the constitutionality of S. 2089 and seek just compensation for an alleged taking of their "property," the United States Claims Court would most likely review their case. Therefore, its determination in the Freese case that congressional preclusion of mining patents is not unconstitutional is particularly significant to the pending legislation.

Secondly, the Freese court is not alone in its legal conclusion. The argument that the government is required to hold open indefinitely the option to apply for a mining patent was specifically rejected by the United States Court of Appeals for the Ninth Circuit. *Alaska Miners v. Andrus*, 662 F.2d 577 (9th Cir. 1981). The Supreme Court itself has upheld the right of the federal government to convey title to land subject to unpatented mining claims and thereby permanently preclude the issuance of patents. *Shepley v. Cowan*, 91 U.S. 330 (1875); *see also* *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 (1904); *Teller v. United States*, 113 F. 273 (8th Cir. 1901) (valid mining claim does not limit the rights of the United States as the paramount title holder); *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968). There is no reason to believe that these decisions will be reversed in the near future.

In conclusion, I repeat my firm belief that both S. 2089 and H.R. 1039 rest upon firm constitutional ground. I hope that the Subcommittee will act quickly to ensure that additional federal lands and oil shale resources are not squandered.

Sincerely,

Kathleen C. Zimmerman
Counsel
Public Lands and Energy

Enclosure

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

May 3, 1988

TO : House Interior and Insular Affairs Committee
Subcommittee on Mining and Natural Resources
Attn: Jim Zoia

FROM : American Law Division

SUBJECT : Comments on Law-Firm Memorandum Alleging Existence of Taking Issues in Pending Bills That Would Block Certain Oil Shale Claimants from Proceeding to Patent

You have asked that we offer comment on a legal memorandum prepared by a law firm, entitled "Constitutional Issues Raised in Section 2 of S. 2089 and H.R. 1u39." S. 2089 and H.R. 1039 prohibit the patenting of certain unpatented oil shale claims, and require that owners of such claims either apply for a lease under the 1920 Mineral Leasing Act or maintain the claim subject to new conditions to assure diligent efforts toward oil shale production. The constitutional issue to which the memorandum title refers is the taking issue -- that is, whether the scheme of the indicated bills results in a fifth amendment taking of vested property rights of oil shale claimholders, requiring payment of just compensation.

This memorandum only addresses selected points made by the captioned document; it does not provide a full taking analysis of the bills.

First, the memorandum repeatedly asserts that pre-patent mining claims are property for purposes of fifth amendment taking analysis. This is doubtless true, but should not be confused with issues more pertinent to a taking analysis of the two oil shale bills -- namely, whether holders of such claims have a constitutional property right to proceed to patent, and whether subjecting claimholders to conditions beyond those applicable under the law in effect when the claim was perfected can result in a taking.

Second, the memorandum is somewhat misleading in discussing whether claimholders have a constitutional right to obtain patents. After "seriously question[ing] whether the denial of patents ... is constitutional" (page 3), the memorandum cites a Supreme Court statement that the owner of a valid claim has the "right ... to demand and receive a patent at a small sum per acre after he has put" $500 worth of labor or improvements upon the claim. The clear implication of the memorandum is that the Court was asserting the existence of a constitutional right. The context of the quote, however, makes evident that the Court was simply summarizing the general mining law, and that accordingly it was doing no more than describing a statutory right, rather than asserting a constitutional one cognizable under the taking clause. Cole v. Ralph, 252 U.S. 286, 294 (1920).

Indeed, there is ample support for the opposite proposition, that a claimholder has no vested right to issuance of a patent until he applies for the patent and satisfies the various procedural requirements set forth in the general mining law. The leading modern case for this rule, Freese v. United States, 639 F.2d 754, 758 (Ct. Cl.), cert. denied, 454 U.S. 827 (1981), notes that the rule is "well-settled," and indeed a line of nineteenth-century Supreme Court cases reveals that full satisfaction of application requirements has long been a precondition to patent entitlement even outside the realm of general mining law patents. Worth v. Branson, 98 U.S. 118, 121 (1878), and cases collected therein.

Third, the memorandum (page 4) quotes a lower federal court decision to the effect that pre-patent claimholders "may well have an existing right to prevent third parties from interfering with their possessory interest." The apparent suggestion of the author is that Congress is thereby precluded from imposing additional prerequisites to retention of a valid claim. However, the clear reference of the quotes is to "third parties" -- i.e., those other than the claimholder and the United States.

Fourth, the memorandum (page 6) states that "revocation or interference with the vested rights under a valid oil shale mining claim ... will constitute a taking. We think that is what H.R. 1039 does." This assertion is difficult to analyze since its precise referent in the House oil shale bill is unclear. If it refers to the authority granted the Secretary of the Interior to impose new conditions on claimholders to assure diligent efforts, it would seem under existing authority not to effect a taking unless (a) the conditions are actually imposed, and (b) they are unreasonably burdensome. See authorities cited in related discussion in R. Meltz & P. Baldwin, "Congressional Actions That Would Block or Void the Patenting of Oil Shale Claims: Constitutional Issues" 13-14 (CRS Report 1986). Added regulations that are plausibly calculated to promote diligent efforts toward shale mining on claims granted for that purpose and long ignored by claimholders would seem readily sustainable, particularly given Congress' plenary power over the public lands.

Fifth and finally, the memorandum (pages 8-9) notes four recent Supreme Court decisions in the taking area, and asserts that they "seem to say ... that where the loss of private property and its economic rents is shown, a Fifth Amendment taking will be upheld ...." In fact, however, these cases do not support so sweeping a proposition. At most, recent Supreme Court taking decisions say that regulatory interference with private property amounts to a taking only when profitable operation of the property is precluded. See, e.g., Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232, 1247-1248

(1987). Moreover, the memorandum mischaracterizes certain Supreme Court holdings. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987), for example, did not hold that "a ... taking occurred under a county flood control ordinance that prohibited construction ...," but rather *assumed* arguendo that a taking had been effected by the ordinance and went on to address an entirely separate issue, that of constitutionally required remedy.

Robert Meltz
Legislative Attorney

APPENDIX II

Additional Material Submitted for the Record

Working for the Nature of Tomorrow.
NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

May 9, 1988

The Honorable John Melcher, Chairman
Subcommittee on Mineral Resources Development and Production
362 Dirksen Senate Office Building
U.S. Senate
Washington, D.C. 20510

RE: Additional Comments for the Record of the Subcommittee's April 22, 1988 hearing on S. 2089.

Dear Chairman Melcher:

The National Wildlife Federation appreciates your efforts to examine this legislation to resolve the oil shale claims controversy. We have reviewed S. 2089, and believe that it should be approved without change by the Senate Energy Committee.

On two separate occasions during this Congress the Federation has testified regarding oil shale claims -- October 16, 1987, and April 22, 1988. Tom Lustig and Karl Gawell testified last Fall regarding the history of claims, the environmental consequences of loss of these lands, and the efficacy of H.R. 1039. Kate Zimmerman testified about the constitutionality of H.R. 1039 and S. 2089 at your recent hearing. We understand that these statements, and the oral testimony presented, are already part of the record.

However, in reviewing the statements made at the Subcommittee's hearings of April 22, we felt that it would assist the Subcommittee's deliberations to address several misstatements made by other witnesses. We have also attached an April 29, 1988, statement by Steve Blomeke, Executive Director of the Colorado Wildlife Federation which also responds to statements submitted at that hearings. We request that this letter and the attached statement of Mr. Blomeke be incorporated into the record of the Subcommittee's April 22 hearing.

S.2089 Is Consistent With The Purposes Of The Mining Law

The Department of the Interior and the alleged claim holders misrepresent the original purposes of the Mining Law. The Mining Law was intended to promote the mining and production of natural resources from the public lands. As Professor Leshy examines in more length in his book, The Mining Law, the practices of the mining industry in the late 1800's support a strict reading of the obligation to diligently mine a claim in order to have any rights under the law.

It is illuminating to parallel Interior's bill with S.2089 on this point. While the primary requirement imposed by S.2089 is that claimants begin working their claims, the primary requirement of Interior's bill is that claimants apply for a patent. Nowhere in Interior's bill is mineral activity required or even encouraged.

The government has over the decades patented over 300,000 acres of oil shale land holding some 224 billion barrels of shale oil. (See attached "Table 4" from the House Appropriations Committee's Surveys and Investigations Staff report dated February 1987.) No commercial production has occurred on these lands.[1] Much of this land has been given to the same companies and individuals who are now demanding more public oil shale property. Patenting more public property to oil companies and land speculators will not promote production.

The "deal" established in the Mining Law was that claimants were first supposed to mine their land, and in return would receive "exclusive possession" of public property and charged no rental, royalty or other fee. Then, after at least five years of mining, they could apply for a patent to be issued for the claim. Interior's proposed legislation seems to be based upon a very distorted interpretation of the Mining Law.[2]

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[1] More than 2,000 oil shale claims have been patented. If patenting promoted production we would expect a far more vigorous shale oil industry that currently exists. The only producing shale oil facility is not considered a commercial operation and is supported by substantial federal subsidies. This facility is located on land patented under the Homesteading Act, but reportedly uses oil shale from patented mining claims.

Your proposal, S. 2089, is fully consistent with the purposes of the Mining Law. The Interior Department's proposal is not. The DOI proposal is only consistent with the policies it adopted when it decided to dispose of 82,000 acres of public lands last year. Which proposal serves the public interest is clear: the public interest will be served by the mining and production of shale oil -- not by the disposal of more public property for a fee of $2.50 per acre.

The National Wildlife Federation supports the policy adopted by Congress in the Federal Land Policy and Management Act of 1976 that the public lands should be retained in federal ownership and managed for multiple-use purposes.

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[2] Similarly, the arguments of the claimants that the Congress is intending to "welch" on a deal are erroneous. The claim holders fail to point out that a patent was intended to follow mining and production -- not preceed it. Moreover, while it is correct that a patenting fee is not intended to represent "fair return" for the property, the government was expected to obtain a "return" which served the general public welfare in the form of mineral production.

FLPMA's statement of policy applies to all of the public lands -- mineral and surface estate. The Department misrepresents the views of supporters of S.2089 when it states that they are interested in retaining only the surface.

The Interior Department Proposal

The bill offered by the Department of Interior as a substitute for S.2089 is completely unsatisfactory as a means to resolve the ongoing oil-shale controversy. Although the bill they offer appears to give away only the mineral rights, the final result will be the same as the outrageous settlement of 1986: large amounts of public land will be sold for a fraction of the market value. Once the transaction is complete, claimants will be under no obligation to produce shale oil.

The current BLM land sale regulations provide for direct, non-competitive sale of public lands in exactly the type of situation which will result from this proposal. (See 43 C.F.R. 2711.3.)[3] This is not an unanticipated result of the proposed legislation. The Department of the Interior produced a proposal on the last day of consideration of H.R. 1039 by the House Interior Committee. That proposal explicitly provided for direct sale of the surface to the claimants after the oil shale was patented. As we pointed out then, this does not address the many public policy issues presented by the oil shale claims dilemma.

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[3] The testimony of the claimants also makes it clear that they will argue that the conditions for a direct, non-competitive sale exist. Aguila Energy, for example, states that they would be interested in the surface "to prevent being extorted by the surface owner to cross his property; that already happened to us...." Remarks of John Herr, Owner, Aguila Energy, April 22, 1988, page 5.

However, even assuming that the only issue Congress wishes to resolve is the disposal of these lands for less than fair market value, this proposal falls short. The testimony before the House Interior Committee indicated that full value of these lands is typically \$1,000 to \$2,000 an acre. Of that amount, the surface estate typically represents only \$80 to \$100 an acre.[4] The DOI proposal does not resolve the fact that these lands would be disposed of for a small fraction of their fair value. It only raises the fraction which the public will receive from minuscule to small.

(footnote cont'd)

[4] See, statement of Frank Cooley before the Subcommittee on Mining and Natural Resources, Committee on Interior and Insular Affairs, March 3, 1987. U.S. Government Printing Office, Serial No, 100-1, page 130.

The Department's proposal would also require the Congress to accept the premise that these claims are valid and have been held legitimately over the past 60 years. In fact, Assistant Secretary Cason states that the Department's overriding concern is to "ensure that the possessory and equitable rights of the claimants are acknowledged and protected." The Department would have the government adopt a presumption of regularity regarding these claims.

S. 2089 does not directly address the issue of the validity of the existing oil shale claims.[5] Instead, it would leave this issue to the discretion of Secretary of the Interior. While we believe that there are numerous legal infirmities regarding these claims, we can accept the decision not to address this issue in the Senate legislation. However, we strongly object to the Department of the Interior's proposal to adopt an official policy of ignoring the legal questions about the validity of these claims.

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[5] For this reason, the arguments of the claimants that validity examinations would simply result in extensive new litigation do not properly address the legislation being considered. Litigation over these questions stems from the failure of the claimants to comply with the terms of the 1872 Mining Law, not the legislation currently pending before Congress.

Finally, the Department does not address the fact that its proposal -- at best -- would create large expanses of split estate lands. The management difficulties which are inherent in split estate lands are not even discussed by the Department. The interests of the mineral estate holder may dominate surface uses, leaving the Bureau of Land Management with lands which it would find "difficult and uneconomic to manage." This would also make these lands priority properties for sale. (See 43 C.F.R. 2710.0-3(a)(3).)

Oil Shale Production and the Market Price of oil

The testimony also defended the lack of shale oil production by arguing that the current market price of crude oil would not support such production. Notably, no testimony was received on the economics of shale oil production or on the prospects for changes in world oil markets at the April 22nd hearing. The Congress has, however, heard many times in the past about oil shale economics and this Committee has recently held extensive deliberations about world oil markets.

"Large scale oil shale development is imminent in Colorado, Wyoming, and Utah." This bold conclusion was made in 1974, during hearings on oil shale before the House of

Representatives by then Representative William Armstrong.[6] At that time, oil was being landed for as much as $15 a barrel, and the testimony of several large oil companies indicated that shale oil was economic between $6 and $10 a barrel.

In fact, the predictions of oil shale's imminent production date back to the turn of the Century. As early as 1918, the National Geographic Magazine declared: "The success attained by the oil-shale industry in Scotland indicates far greater success for the industry in the United States. Not only is the oil content of the American deposits larger than that of the Scotch -- in some cases more than three times as large -- but the American rock can be mined more cheaply."[7]

Moreover, oil shale production is not simply a function of world oil prices. The costs of production will be as important a factor in oil shale commercializations as world oil prices. In the past, numerous engineering studies showed that shale oil might be produced at very reasonable costs -- competitive with $20 a barrel oil in current 1988 dollars.[8] These assessments were, however, highly speculative and subject to considerable uncertainty. Notably, the range of uncertainty means that eventual production costs may be higher or lower than these estimates.

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[6] Hearings before the Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, 93rd Congress, 2nd Session, on H.R. 12014 and Related Bills, Serial No. 93-46, page 89.

[7] "Billions of Barrels of Oil Locked Up in Rocks," The National Geographic Magazine, February 1918, pages 195-205.

Only when oil shale production is attempted will we really know whether it is, or is not, economical. Only then can the assertions of the claimants that oil prices are inadequate to support an industry be supported. Today, the experience with oil shale production is so limited that the only statement which can be supported is that development of a shale oil production facility would be a significant risk. However, S. 2089 would allow claimants as long as 20 years to reach a reasonable level of production, through the leasing option.

The testimony before the Senate Energy Committee this year regarding world oil markets has been extensive. Every members of this Committee is aware of the fact that within the next twenty years world oil prices are likely to increase substantially. There is widespread agreement amongst the experts that world oil supplies are declining while demand continues to grow, and that future crises are inevitable. It is at least in part the risks to national security and the national economy posed by the future prospects for oil supply shortages which led the Committee to take legislative action regarding the Arctic National Wildlife Refuge.

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[8] See, for example, "Oil Shale: The Prospects and Problems of an Emerging Energy Industry," Annual Review of Energy, Volume 1, 1976, pages 183-212. Current dollars above based upon cost figures cited adjusted using Department of Commerce GNP deflator.

The oil shale lands addressed by S. 2089 hold far more oil potential than the Arctic National Wildlife Refuge. Furthermore, the presence of oil on these lands is not a one-in-five gamble -- it is there in great quantities. For example, the claims already patented by John Savage hold over one billion barrels of recoverable oil resources. (*See* Table 4 attached.) The 143 claims Mr. Savage, et al., still holds could yield more than twenty-two billion barrels of shale oil![9] Yet, the Committee is told by Mr. Savage that it would be unfair to require him to spend at least $1,000 of work annually on each claim towards producing shale oil!

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[9] Assuming the presence of the Green River shale formation on the claims at an average rate of yield.

These claims are held under a law which intended to promote mineral production -- not the personal fortune of Mr. Savage. S. 2089 would promote production, and allow Mr. Savage and others more than two decades to make substantial personal profits if, and only if, they produce shale oil from these lands. We believe that S. 2089 is eminently fair.

Other Arguments Made By Claimants:

The testimony also raised the argument that S. 2089 was unfair to the small miners because they cannot afford to spend $1000 per claim developing shale oil. If a claim holder is such a small entity that it cannot afford to invest $1,000 per claim annually, it obviously will never be able to spend the millions of dollars necessary to produce shale oil. The claim holder, then, by definition is holding the claim on the speculation that it will be valuable to an larger entity with the resources necessary to profitably produce shale oil. (Testimony before the House and before this Subcommittee has demonstrated that there is no difference in one's ability to obtain financial support for a mining operation on a valid claim and patented land.)

Finally, we wish to note that the assertions of the claim holders that their prior expenditures are proof of their entitlement to patent is erroneous. The work which was performed, almost without exception, was -- and still is -- required by law in order for these claim holders to maintain rights to their claims. The rights so maintained -- rights to mine the shale oil on these lands -- are specifically preserved and encouraged by S.2089.

Conclusion

Over twenty years ago, Tom Kimball, then the Executive Vice President of the National Wildlife Federation, urged Congress to take legislative action regarding these old oil shale claims. In his testimony, Mr. Kimball urged Congress to:

> Declare invalid -- or null and void -- all old claims on lands on which the required assessment work has not been done. The original claimants have long since passed on from this frail existence. Attorneys out for a fast buck and some oil companies apparently are now showing an almost exclusive interest in reviving the validity of what was once determined by the Interior Department and the Courts to be an invalid mining claim. Otherwise, the entire oil shale program seems destined to settle into a morass of inactivity necessitated by the resolution of claims and counter-claims -- a process which could take decades.[10]

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[10] Statement of Thomas L. Kimball, Executive Vice President, National Wildlife Federation, before the Committee on Interior and Insular Affairs, on the Federal Oil Shale Program, September 15, 1967.

Two decades later, after endless litigation and the loss of 82,000 acres of public lands, Congress once again is considering taking legislative action. This time we hope that Congress will finally take action to resolve this controversy before even more public lands are disposed of to land speculators.

We strongly urge the Senate Energy Committee to report S.2089 favorably to the full Senate without amendment. We urge the Committee to take this action at the earliest possible date.

Sincerely,

Ronnie Weiner

Karl Gawell
Legislative Rep.
Public Lands and
Energy Division

Ronnie Weiner
Conservation Intern
Public Lands and
Energy Division

KG/RW:kg
Attachments
cc: All Members of the Subcommittee

STATEMENT ISSUED BY STEVE BLOMEKE
EXECUTIVE DIRECTOR, COLORADO WILDLIFE FEDERATION
APRIL 29, 1988
REGARDING THE OIL SHALE MINING CLAIMS CONVERSION ACT

Sen. Bill Armstrong is betraying a public trust by opposing the Oil Shale Mining Claims Conversion Act. We have already lost 82,000 acres of public land when the government sold them for $2.50 an acre. Now Sen. Armstrong is advocating the sale of the rest of this land. As a senator and a public servant, he should try to save our public lands, not be anxious to give them away.

Sen. Armstrong submitted written testimony Friday, April 22, and issued a press release full of brightly colored rhetoric blasting legislation introduced by Sen. Tim Wirth (D-Colo.) and Sen. John Melcher (D-Mont.) that would stop the sale of patents for any oil shale claims on federal lands. The written testimony was submitted to the Mineral Resources subcommittee of the Committee on Energy and Natural Resources.

But I was puzzled by news reports the next day in both Denver dailies and by Armstrong's own press release. The release implies, and the stories state explicitly, that Sen. Armstrong testified in person before the subcommittee. Our people were there and Armstrong never showed up. If he cares as passionately about this issue as his rhetoric implies, he should have presented his testimony to the subcommittee in person. His cry that the oil shale legislation represents typical Washington maneuvering is muffled by this typical Washington maneuver.

The Wirth/Melcher legislation (S.2089) would not "welch" on a government contract as Sen. Armstrong claims, but does bar patents from

-more-

being given to oil shale claims filed after Feb. 5, 1987. Under the legislation, miners can maintain their claimsbut would not be able to gain title to the land's surface. Certainly that is not unreasonable. Who would suggest that land be sold for the price of less than a six pack of beer? Claimants would either have to develop the oil shale on their claims in 10 years or lose their rights to the claim. There also is a 20-year lease option for claimants. Those provisions are extremely fair.

Sen. Armstrong also says that these are not public lands. That claim is specious and Sen. Armstrong should know better. In his world, the 1872 mining law these claims are dependent on is interpreted as giving the claimholders eternal rights to these lands. Congress clearly did not mean to let people keep speculative claims on public land for 70 years or more and then sell them title to the land for a song.

Testimony before the Senate last week clearly showed that the Wirth-Melcher bill is constitutional, does not represent an illegal "taking", and is within the rights of the U.S. Congress. But this legislation is not only proper in scope, it is right in principle -- a point lost on Sen. Armstrong.

The evidence strongly suggests that most of the claims are not valid under existing law, and to allow claim holders to keep them as their private land i illegal, as well as wrong. The Department of Interior thumbed its nose at the American public when it turned over 82,000 acres of land with questionable claims to private ownership at bargain-basement prices. We have to act now if we're going to prevent another 270,000 acres from meeting the same fate.

-more-

I am also concerned that under Armstrong's vision of the law, companies would be able to mine oil shale without paying royalties to federal and stat governments, and without strict requirements for reclamation of the land.

Congress has the right to pass legislation to regulate how these public land will be used, and it has an obligation to protect the public interest.

Sen. Armstrong is trying to prevent Congress from passing this legislation, without suggesting how Congress protect these public lands from passing into private ownership, and without ensuring that the government -- and through it the people -- would get their fair share of royalty payments and be able to guarantee reclamation of the land.

As a hunter and a representative of the largest sportsmen's organization in the state, I am interested in maintaining access for hunters to our public lands. Hunting plays a key role in our economy, and is dependent on access to the public lands.

The lands Sen. Armstrong wants to turn over to private ownership contain one of the largest mule deer herds in the world. These lands are an irreplaceable economic resource for the Western Slope and the entire state.

The Melcher-Wirth bill protects this land -- land used for hunting, camping, hiking and grazing. It is public land and should not be parceled out in some government giveaway.

- 30 -

Contact: Steve Blomeke
(303) 830-2557

TABLE 4. ESTIMATED OIL SHALE ACREAGE AND RESOURCES IN THE PICEANCE BASIN, COLORADO

Company	ACRES[1] Owned Before October 1986	ACRES[1] Patented Under Settlement November 1986	ACRES[1] Total	RESOURCES[2] (Million Barrels) Owned Before October 1986	RESOURCES[2] (Million Barrels) Patented Under Settlement November 1986	RESOURCES[2] (Million Barrels) Total
Amerada Hess		7,802	7,802		8,709	8,709
Amoco	2,460		2,460	132		132
Atlantic Richfield Co.	9,500		9,500	4,354		4,354
Bell Petroleum	3,160		3,160	6,635		6,635
Cities Service	10,560		10,560	3,641		3,641
Colony	23,880		23,880	9,009		9,009
Continental Oil Co.	10,840		10,840	360		360
D.A. Shale	3,760		3,760	139		139
Exxon	24,140	8,917	33,057	31,654	9,948	41,602
Farnum		520	520		9	9
Gabbs		898	898		477	477
Genelle Woodruff	2,860		2,860	193		193
Getty	24,200		24,200	15,596		15,596
Hugg		2,000	2,000		72	72
Hugh Caldwell	320		320	387		387
J.C. Nelson	3,040		3,040	2,318		2,318
Kerogen	1,920		1,920	451		451
Marathon	760		760	2,034		2,034
Meserve	11,840		11,840	538		538
Mintech	1,480		1,480	1,557		1,557
Mobil Oil Co.	33,620		33,620	17,387		17,387
Savage	2,960	4,380	7,340	211	834	1,045
Shell Oil Co.	7,620		7,620	3,364		3,364
Standard of California	41,940		41,940	18,583		18,583
Superior	7,340		7,340	7,101		7,101
Tenneco	2,440		2,440	165		165
Texaco	18,090		18,090	3,943		3,943
Theo Ertl, Trustee		20,591	20,591		15,552	15,552
TOSCO	880	18,398	19,278	2,209	20,554	22,763
Union of California	30,220	18,390	48,610	15,250	20,744	35,994
Total	279,830	81,896	361,726	147,211	76,899	224,110

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[1] Company acreages estimated from map "Oil Shale Mineral Right Ownership."

[2] Company resources were estimated from the percent of acreage held in each township multiplied by the shale oil resource for that township as extrapolated by the U.S. Geological Survey for 12 oil shale zones.

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LAWRENCE M. MINCER
KRISANDRA L. KREFT
NEIL S. MINCER

April 19, 1988

The Honorable John Melcher
Chairman, Mineral Resources Development
and Production Subcommittee
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Re: Unpatented Oil Shale Mining Claims
S2089

Dear Senator Melcher:

On behalf of myself and several other owners of unpatented oil shale mining claims in Garfield County, Colorado, I would request inclusion of the enclosed statement in the records of the hearings on Senate Bill 2089, and consideration by the full committee of the matters set forth in the statement.

Yours very truly,

Neil S. Mincer

NSM/rjj
Enclosure
Federal Express Airbill #7002088564

My name is Neil S. Mincer and I am an attorney in Glenwood Springs, Colorado. Although I have represented Union Oil Company in matters pertaining to water, ranch properties and permits, I have not represented any oil companies in obtaining patents to oil shale lands. My clients are individuals who inherited or purchased interests from original locators.

In 1952 I represented Clair Catlin, daughter of B.T. Napier in connection with some estate matters and she consulted Allyn Cole about the patenting of the Southwest, the Northwest, the Northeast and the Southeast Oil Shale Placer Mining Claims which for convenience we have referred to as the "Compass Claims". Mr. Cole advised her that he was not doing private practice and suggested that she employ me to determine the status of the claims. In examining the title for the Compass Claims, I found the notice of the assessment contests filed against them in about 1930. Being inexperienced in oil shale matters at that time, I sought counsel from Allyn Cole respecting the significance of these contests. He had had a long history of legal practice involving oil shale claims. In the 1940's he had done patent work for Union Oil Company of California, Tell Ertl and others. He explained to me how a man named Ralph Kelley, who was Chief of the Field Division of the General Land Office, had tried to invalidate all oil shale claims on this basis in the late 1920's and early 1930's, and how the Supreme Court had overturned his actions. Citing the Krushnic and Virginia-Colorado decisions of the Supreme Court and The Shale Oil Co. decision within the Interior Department, he told me these contests were of no effect, and, all else being regular, would not prevent grant of patent on these claims. He said he had previously secured patents on oil shale claims that had had these assessment contests against them. I examined these decisions and satisfied myself that the assessment contests had indeed been declared void and of no effect.

In the course of this research, I also became familiar with the 1927 Freeman v. Summers case which had confirmed that oil shale was a valuable mineral and that oil shale claims were properly locatable under the mining laws. I do not recall in the 1950's that anyone ever raised a contrary view. Given the fact that oil shale claims had been patented by the Department of Interior since 1920 and were still being patented in 1950, it would have been difficult to place much credence in any such argument.

On behalf of the B.T. Napier heirs, I wrote to Mr. Farnum, Luther Armstrong, John Armstrong and C.R. McCarthy. As a result, Jack Farnum had joined Mrs. Catlin in the discussions about patenting the claims. I advised them of the results of my research and recommended proceeding with the patent's application. With their concurrence, I then filed a forfeiture notice, quieted title and prepared the patent application. Allyn Cole advised and assisted me in this work. The patent application was filed on March 11, 1959.

On May 29, 1959 the application for patent was mailed to the Bureau of Land Management. In June the decision of the B.L.M. was to make additional requirements including a copy of the posted notice and a supplemental abstract. On June 25, 1959 I went to the Bureau of Land Management in Denver and discovered that they had misplaced the copies of the posted notices that had been requested in the decision of June 19, 1959. Either I delivered the supplemental abstract or determined the filing date so that I could order the supplemental abstract, which, of course, was delivered to the B.L.M. E.L. Olson, an adjudicator in the Bureau of Land Management, advised me that everything had been done that was necessary at that time in connection with the application. On August 3, 1959 Dale R. Andrus, Land Officer Manager, for the Bureau of Land Management wrote to the publisher of the Grand Valley News enclosing the notice of the application for patent and instructed the publisher to publish a notice in the Grand Valley News for nine consecutive weeks. The publication was completed and I made arrangements for each of the owners to have available their share of the amount necessary to pay the government under the applicable law relating to placer mining claims.

On June 17, 1960, again I visited the Bureau of Land Management to find out what was happening with regard to the application for patent. I was advised that the mineral lands inspector claimed that the eastern portion of a part of the land was non-mineral and they wanted to eliminate the East half of the East half of the Northeast Quarter from the application. After consultation with the owners, it was agreed that we would relinquish that forty acre tract and a relinquishment form was executed in duplicate by the claimants of the Northeast placer mining claim and mailed to the Bureau of Land Management on July 25, 1960. On August 29, 1961 we received a refund from the Bureau of $100.00 which was divided among the claimants as their interests appeared. I made several inquiries at the Bureau of Land Management but could never get any answer to what was holding up the application. Finally, on February 16, 1962, a decision was handed down by Dale R. Andrus, rejecting the application in part on the grounds that the claims had been subject to adverse proceedings in 1931 for failure to perform annual assessment work. The contest as to the Southwest placer mining claim was dismissed in the adverse proceedings and the decision went on to state that the conclusiveness of the Commissioner's decision was in no way affected by Ickes vs. Colorado-Virginia Development Corporation and the Shale Oil Company case in 55 I.D. 287. The application was rejected as to the Northeast, Southeast and Northwest placer mining claims. That decision was appealed by the claimants.

Since the 1962 B.L.M. decision, we have been in Courts and Land Office hearings as well as the United States Supreme Court, for such a long time that all the original applicants are dead and the present claimants have exhausted their funds and patience over the many years trying to establish their legal rights. The B.L.M. held our money for almost thirty years before finally issuing patent on the Compass Claims in 1986, but with restrictions.

Many of the same claimants who owned the Compass Claims have an interest in the Eagle Rock claims for which no application has been filed because of the uncertainty of the attitude of the governmental decision makers. They continue to do the assessment work each year as have the owners of the Blue Spruce Group.

The assessment work on the Eagle Rock claims shows 2240 acres and on the Blue Spruce Group 2400 acres. If patents are issued, it is obvious that the cost will be many times the $2.50 an acre that the press and our opponents claim.

My many hours spent on oil shale matters hardly will be adequately compensated on a contingent basis even if unlimited patents are issued.

Respectfully submitted,

Dated April 19, 1988.

Neil S. Mincer

Neil S. Mincer

The Honorable John Melcher
Chairman, U.S. Senate Subcommittee on Mineral
Resources, Development and Production
of Senate Committee on Energy and
Natural Resources
United States Senate
Room 362, Dirksen Building
Washington, D.C. 20510

April 21, 1988

Dear Chairman Melcher:

I respectfully request that you treat this letter as my statement pertaining to S. 2089, 100th Congress, 2d Session, relating to pre-1920 unpatented oil shale association mining claims. I respectfully request that you insert this letter together with enclosures into the record of the Hearing which I understand your Subcommittee is going to hold on S. 2089 tomorrow. An original and one copy of this letter with two sets of the enclosures are enclosed.

For the record I want you and your Subcommittee to know that I, as an attorney in the Denver Regional Solicitor's office, Department of the Interior, Denver Federal Center, was the one who raised the questions relating to the invalidity of pre-1920 unpatented oil shale mining claims in the years 1955 to 1964. My positions and my work on legal problems associated with oil shale mining claims had a tremendous impact on the positions taken in the Regional Solicitor's office and in the Interior Department. (This letter does not relate what happened to me in Interior as a result of my positions on oil shale matters.) I am no longer with the government.

I want you and your Subcommittee to know that no one on your Subcommittee as well as its staff can convince me of the propriety and the legality of the August 4, 1986 Settlement Agreement and the disposals of 82,000 acres of Federal oil shale lands subject to the terms of Agreement in light of my experience with pre-1920 unpatented oil shale mining claims and in light of the facts which I believe I know to establish the invalidity of such claims, if the law is properly applied to such claims.

Because S. 2089 does not contain provisions to require the Secretary of the Interior to determine the validity of pre-1920 unpatented mining claims covering some 260,000 acres, or more, of oil shale lands in the

States of Colorado, Utah and Wyoming, the bill as it now stands in my opinion is totally unjustifiable. As I view the provisions in the bill, the bill, if enacted into law, will permit present holders of pre-1920 unpatented mining claims, to in effect, preempt the vast oil shale deposits in the above lands as provided in the bill on the theory that these pre-1920 unpatented mining claims are somehow deemed or to be treated by Interior as valid. Rights to the oil shale deposits of the people of the United States should not be given away by Congress under an erroneous assumption that the pre-1920 unpatented mining claims covering the above lands are valid.

I regret that your Subcommittee has not seen fit to invite and/or to summon the three knowledgeable lawyers presently in the Regional Solicitor's office, DOI, Denver, who have developed an extensive insight as to the validity and the invalidity of pre-1920 unpatented mining claims. The American people are entitled to the views of these lawyers on pre-1920 unpatented mining claims and on the provisions contained in S. 2089 regardless of whether Secretary Hodel and/or Director of BLM Burford would or would not concur with the views of these lawyers.

The bill fails to spell out who gets the minerals in the above lands aside of the oil shale, and this defect must be cured if the bill is to be allowed to move forward from your Subcommittee.

S. 2089, in my opinion, is more inappropriate than H.R. 1039 passed by the House on June 2, 1987 since H.R. 1039 contemplated that the Secretary of the Interior determine the validity of pre-1920 claims before claims could receive the benefits under H.R. 1039.

I want you and the other members of your Subcommittee to know that I am dead set against Congress giving away rights to oil shale deposits (under the provisions in S. 2089, if enacted into law) containing perhaps 100 billion barrels of recoverable shale oil.

With regard to Section 2 of the bill, I must put the Subcommittee on notice that there is a need for a law to be enacted by Congress to require the nearest Regional Solicitor or the nearest Field Solicitor to give legal approval, if appropriate, before any final certificate is issued by the BLM to a pre-1920 unpatented oil shale mining claim. The claims to be governed under Section 2 of the bill must be contested by the Interior Department since practically every one in Colorado in the Bureau of Land Management and in the Solicitor's office, who handled or handle oil shale matters, know or should know that pre-1920 oil shale unpatented mining claims are prima facie invalid. Where doubts exist as to the validity of such a claim, such doubts should be resolved in appropriate mining contest proceedings on the claim.

Enclosed for filing in the hearing record on S. 2089 with this letter are the following: The Appendix, pages 137 through 153 from the Hearing on Oil Shale Claims and on H.R. 1039 held on March 3, 1987 before the Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, House of Representatives, One Hundredth Congress, First Session; and a copy of my memorandum dated May 26, 1987 which I sent to Honorable Morris Udall and Honorable Nick Joe Rahall of the House Interior Committee and to other members of Congress.

Pending Congress holding appropriate investigations on all matters raised in the above mentioned enclosures I recommend that your Subcommittee do not report out of the Subcommittee S. 2089, except that Congress should enact legislation to embargo the further issuance of oil shale land patents until Congress undertakes and completes its investigations on oil shale matters.

Respectfully,

Fred S. March

Fred S. March, Temporarily at
Box 285
Erie, Colorado 80516

Box 742
Ocean Shores, Washington 98569

OIL SHALE CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON
MINING AND NATURAL RESOURCES

OF THE

COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

H.R. 1039

O AMEND SECTION 37 OF THE MINERAL LANDS LEASING ACT OF 1920
RELATING TO OIL SHALE CLAIMS, AND FOR OTHER PURPOSES

HEARING HELD IN WASHINGTON, DC
MARCH 3, 1987

Serial No. 100–1

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APPENDIX

TUESDAY, MARCH 3, 1987

ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

MAR 3 1987

March 2, 1987

TO: Mr Jim Zoia, Staff Director
Subcommittee on Mining and Natural Resources

FROM: Fred S. March, Temporarily at
Box 285
Erie, Colorado 80516

Enclosed is an analysis of the issues involved in pre-1920 oil shale mining claims and some pending legislation affecting them.

This analysis represents the inputs of various citizens out here who are concerned about the mishandling of the U.S. oil shale domain.

Please include this analysis in your Congressional hearings and feel free to use the insights and ideas embodied in the document.

Comments on Oil Shale Lands Bill, H.R. 1039, 100th Cong., 1st Sess., Introduced on February 5, 1987 by Mr. Rahall for Himself, Mr. Udall, Mr. Vento and Mr. Campbell.

I. Some preliminary comments on oil shale lands background:

In the 1968 1600-page post-hearing brief and appendix volumes thereto prepared by lawyers then in the Department of Interior (DOI) Regional Solicitor's office, Denver, (Vern Witham, Lowell Madsen, and Robert W. Mesch) in contest 359, U.S. v. Winegar et al., and in contest 360, U.S. v. D.A. Shale Co., Inc. there is a presentation of the facts and the law which indicates that the 1st oil shale land patent issued in the Wilson Administration was issued in disregard of DOI's Instructions, dated 5/10/20, (47 L.D. 548) which contemplated that the rule of discovery for oil shale claims was the same as the rule of discovery applicable to oil placer mining claims located under the Oil Placer Act of 1897.

It is understood that it is the opinion of the lawyers who prepared this above-mentioned brief that the 1st patent should not have been issued, and that the additional patents that have been issued since then were erroneously issued on oil shale and in disregard of proper application of the provisions contained in the U.S. Mining Laws, including the Mineral Leasing Act of 2/25/20. You can call Mr. Witham on 303-236-8444 and hear him out yourself as to what he might be willing to tell you on this. In any event, the 1600-page brief contains sufficient factual evidence (and discussion of applicable court decisions) to show that oil shale lands have been improperly administered, managed, and disposed, certainly from the early 20's to 1961. Mr. Russ Shay in 1986, a staffer on the Public Lands Sub-Committee of the House Interior and Insular Affairs Committee, apparently was provided a copy of the 1600 page brief by Mr. J. R. Freeman. It is recommended that you yourself read the brief and appendices thereto, together with U.S. v. Frank W. Winegar, et al., 81 I.D. 370, 16IBLA112, (1974).

Mr. J. R. Freeman in the period 1966-1968 published in the Farmer and Miner (Frederick, Colorado) his comprehensive 51-part series on oil shale entitled "The Multi-Billion Dollar Grab of Oil Shale Lands". It is understood that this series and his related editorials and articles exposes a part of the oil shale scandal that existed in our Federal Government operations from 1920-1968. The sweep and thrust of the entire series has not been refuted with facts by anyone in any significant aspect. The series refers to a number of hearings held before Senate Committees on oil shale. The series can be procured through a Congressman or Senator from the Library of Congress, Legislative Reference Service.

Without attempting to set forth in detail the deficiencies in earlier Senate oil shale hearings, it is enough to state that no committee of Congress has, so far, attempted to uncover facts known to former and present DOI employees and officials that would cause a reasonable, prudent person to conclude that, in the states of Colorado, Utah and Wyoming, there is such a claim in existence that can be called a "valid, unpatented, pre-1920 oil shale mining claim".

With regard to administrative decisions in DOI, and/or decisions in the Courts that purportedly have found certain claims to be valid, it can be said that such decisions and determinations are a product of poor preparation of oil shale contests by present or former BLM and Regional Solicitor staff and inadequate representation of the interests of the United States by present or former Justice Department lawyers. One should not flaw the good work of some of the people in the BLM and of some of the lawyers in the Regional Solicitor's Office because top officials in DOI and DOJ have never seen fit to make oil shale matters a priority matter with appropriate commitment of funds and assignment of knowledgeable and experienced staff to assure the protection of the public interest in the Federal oil shale lands consistent with the intentions of Congress under applicable public land laws, and relevant court decisions, including DOI decisions.

Now follow some remarks relating to the 525 claims (embracing 82,000 acres of oil shale land) involved in the August 4th, 1986 Agreement, an Agreement which Congress has so far failed to investigate and explore whether the Agreement is a valid one and whether it was properly entered into for the United States through an official in DOI and an official in the Department of Justice (DOJ) with the alleged Claim Owners. Insofar as is known, there is no provision in the Mining Laws or in the Mineral Leasing Act authorizing the Secretary of DOI, or his delegatee, and the Attorney General, or his delegatee, to enter into an agreement purporting to compromise litigation where there remained issues of fact and law unresolved as to the validity of the claims. Under law, the Secretary of DOI has a duty to determine which claims are valid, and if found valid, to permit them to be patented "if all else is regular"; and if found invalid, to declare them null and void. See _Knight v. U.S. Land Association_, 142 U.S. 161, 177-182; _West v. Standard_

Oil Co., 278 U.S. 200; Cameron v. United States, 252 U.S. 450 (1920); U.S. v. O'Leary, 63 I.D. 341 (1956); The Dredge Corporation, 65 I.D. 336 (August 14, 1958); Standard Oil Company of California v. United States, 107 F.2d 402 (1940). The authority vested in the Department of Justice, exercised by the Attorney General or his delegatees, should not be used in a manner as to permit the Secretary of the Interior or his delegatees to abdicate the duty and responsibility of the Secretary as outlined in the cases immediately cited above, as was done by entering into the August 4, 1986 agreement. There is no statutory authority cited in the August 4, 1986 Agreement as authority for the Agreement. Failure to cite authority in the Agreement does not comport with standard government practice.

In the annals of public land law administration in our Federal Government, never has such an Agreement as the one of August 4, 1986, been entered into for the United States. It would be a valid conclusion that Congress would have to pass legislation to accept and ratify the August 4 Agreement if the matter is to be closed without any question -- for the Agreement to be treated as a valid one.

Congress should take action to make investigations, and hold hearings, with the object of having appropriate resolutions passed to authorize a special Attorney General to be appointed by the President for the purpose of initiating litigation to set aside the Agreement, and for the purpose of recovering the lands patented under the Agreement, or their values. It can be said that the August 4, 1986 Agreement and subsequent oil shale land disposals thereunder constitute a national scandal far greater in significance that the Teapot Dome Scandal in the '20's.

To appreciate the significance of this oil shale scandal, culminating in the August 4, 1986 Agreement, you should carefully study the entire content of the 2-part Post-Hearing Brief, dated 3/12/82, and the Post-Hearing Reply Brief, dated 3/26/82, both filed by the Government in U.S. v. Weber Oil Co. et al., Colorado BLM contest 193 et al. A former DOI employee most knowledgeable on oil shale matters made copies of these briefs available to Mr. Bill Shafer last Fall. Mr. Shafer is a consultant on mining matters for the House Interior and Insular Affairs Committee. You should make every possible effort to have various Senators and Representatives read into the Congressional Record portions from these briefs to alert the Nation as to some 200 questionable claims which were not specifically the subject matter of the Tosco v. Hodel litigation and decision, but were included in the 525 claims covered by the August 4, 1986 Agreement. There is no reason why these excellent briefs, prepared by Marla Mansfield, Lowell Madsen, and Lyle Rising, then in the Regional Solicitor's Office, Denver, should not be used in alerting Congress and the Nation as to the kinds of claims DOI and DOJ have seen fit to use as a pretense for giveaways of most valuable oil shale reserves (though speculative in nature at present), contrary to the intents and purposes of Mining Laws and the Mineral Leasing Act of 1920. By your getting portions of the briefs into the Congressional Record, through members of Congress who are willing to protect the public interest in the Federal oil shale lands, not only will you be helping to inform Congress on a major natural resource and conservation issue, but you would also be making available to the media of this Nation some crucial facts which point to a massive scandal in our Federal Government operations.

II. Some preliminary comments regarding hearings held before the House Interior Committee and its Sub-Committee on Mining and Natural Resources, last Fall, after the August 4, Agreement was executed.

These hearings before Chairman Udall and Chairman Rahall were not "investigation-type" hearings. DOI did not supply, apparently, for Chairman Udall the presence of certain BLM and Regional Solicitor's staff for the purpose of giving light as to why appeals to TOSCO v. Hodel and related actions by the Executive Branch were warranted by way of full-scale briefs and a full-scale effort by DOI and DOJ to win in the then pending oil shale cases before the 10th U.S. Circuit Court of Appeals in Denver. For DOJ and DOI to abort efforts in the Circuit Court to get a reversal of Judge Finesilver's erroneous decision in TOSCO v. Hodel, including getting two orders of his set aside which made the TOSCO v. Hodel decision applicable to the two batches of claims involved in U.S. v. Energy Resources et al. and in U.S. v. Weber Oil Co. et al., constitutes a severe cloud on the DOI and DOJ operations at the highest levels, perhaps even at the White House.

In these circumstances, it is evident that the staff in the BLM and Regional Solicitors office who have been involved in oil shale matters for many years, have not been given the opportunity to bring to the Congress facts known to them as to why it was most appropriate to litigate the matters involving the 525 claims in the U.S. Court of Appeals, 10th Circuit, and, if necessary, to take any adverse decisions by the Circuit Court by way of a writ of Certiorari to the U.S. Supreme Court for final resolution on all legal and factual issues relating to the

Should be 446 U.S. 657 (F.S.M.

validity or invalidity of the 525 claims. Considering the earlier litigation involving some of the claims which had been up to the Supreme Court in Hickel v. TOSCO, 400 U.S. 48 (1970) and the existence of the confusing, garbled, and erroneous decision by the Supreme Court in Andrus v. Shell Oil Co., 4[illegible] U.S. 657 (1980), it was essential for the U.S. to have taken the 525 claims and the issues surrounding them, all the way to the Supreme Court, if necessary, to get a more definitive opinion by the Court on the issues left unresolved by Hickel v. TOSCO, as, unfortunately, further clouded by the decision in Andrus v. Shell.

On the latter decision neither DOI nor DOJ officials saw fit to file a petition for rehearing, despite the fact that courageous and knowledgeable lawyers in the Regional Solicitor's office properly recommended to the Solicitor of DOI that a petition for rehearing be filed a few days after Andrus v. Shell was announced in 1980. Mr. Bill Shafer was supplied a copy of the memo dated 6/16/80 from the Acting Regional Solicitor to the Solicitor, recommending that a petition for rehearing be filed in Andrus v. Shell. Failure to file the rehearing petition in Andrus constitutes one of the worst failures in DOI and DOJ operations. Congress should investigate this breakdown, secure all the documents written in DOI and DOJ on this matter, and call the former Solicitor of DOI and the other staff involved to explain what happened and why it happened.

Andrus, in effect, covered up the notorious scandal surrounding the preparation and issuance by DOI of Freeman v. Summers, 52 L.D. 201 (1927), a decision which is erroneous as to the facts and the law. This decision and the circumstances surrounding its promulgation were exposed in the 1968 brief and appendices in contests 359 and 360, mentioned above, and further exposed in an Appendix to the 2nd part of the Post-Hearing Brief (3/12/82) in Weber.

In view of what has been stated above and in light of the fact that Congress has not to this date authorized appropriate investigating committees to be formed for the purpose of investigating all matters relating to the management, administration and disposals of oil shale lands, including oil shale land exchanges and problems associated with leases heretofore issued on oil shale, it is recommended that Congress enact legislation to flatly embargo the issuance of further oil shale land patents by DOI under the guise of "valid pre-1920 oil shale mining claims" pending further action by Congress. It is commonly known that it would be rare indeed to find one such valid claim. In these circumstances, and in absence of full-scale investigations by appropriate Congressional Committees of the validity or invalidity of such claims, and such other matters pertaining to the application of the Mining Laws and Mineral Leasing Act to pre-1920 oil shale mining claims, one has to conclude that H.R. 1039 is a premature bill and should not be enacted until Congress really finds out why and to what extent DOI and DOJ have not been able to cope with pre-1920 claims so as to fully protect the public interest in the National Federal oil shale lands.

III. Some preliminary comments regarding contesting of pre-1920 claims:

It is a proper conclusion that the Secretary of DOI through the BLM under present law can wipe out these claims in contest proceedings, if only BLM would use all applicable charges upon which such claims can be contested, and provided that the BLM, with Regional Solicitor's staff, prepares the contests for hearings adequately and the evidence is presented in proper form through qualified experts for the record by experienced trial lawyers knowledgeable in all phases of mining law, Federal and State, and other laws applicable to such claims. What seems to be apparent in the Denver area is that top DOI officials are unwilling to contest defective claims of the kind discussed in the Weber briefs. In other words, the Secretary, through his delegatees, is breaching a public trust by failing to carry out the laws which are applicable to pre-1920 oil shale mining claims. DOI did not adequately prepare and fully contest the 525 mining claims covered by the August 4, 1986 Agreement. Defaults started in the initial contests on these claims and culminated in the failure by DOI and DOJ to carry through on the appeals to the U.S. Circuit Court of Appeals, 10th Circuit -- and to the U.S. Supreme Court, if necessary.

There are eight or more charges that can be used as a basis upon which to contest pre-1920 unpatented oil shale mining claims.

IV. Some comments on H.R. 1039:

This bill apparently was prompted by the controversy over the August 4 Agreement, its negotiation and execution. However, under Section 1 the bill fails to contain a finding that "The Agreement of August 4, 1986 between the U.S. (through an official of DOI and an official of DOJ) and Claim Owners, parties to the Agreement was illegally entered into, without authority of law".

As the bill now stahds, if enacted into law, there is a distinct possibility that in future it will be construed as representing a ratification by Congress of the Agreement and the disposals of oil shale lands made thereunder. It would be improper public policy to throw a blanket by way of this bill, to conceal the various scandalous aspects of the Agreement, including its negotiation, without participation of those users of the affected lands that would be adversely affected. Certainly, Colorado, including its citizens are adversely affected by the land transfers under the pretext of the Agreement. In effect, the United States and Colorado are robbed of vast future revenues from bonuses, rentals and royalties, from the improperly divested oil shale lands.

There should be a finding in the bill that "The vast oil shale lands of the Federal Government have been improperly administered, managed, and disposed by the U.S. DOI in the years 1920 to the present, contrary to applicable law."

With regard to finding (1) following the words "...Act of May 10, 1872," add "as supplemented by the Act of February 11, 1897 (29 Stat., 526)". In this regard, see "Instructions", dated 3/10/20, 47 L.D. 548. The Freeman v. Summers decision issued in 1927 did not discuss the applicability of the Oil Placer Act of 1897 to oil shale claims. However, it is believed that DOI made an effort to circumvent these Instructions of 3/10/20 by Assessment Work on Oil Shale Claims (52 L.D. 333 [1927]).

With regard to finding (2), Congress under Section 37 never contemplated that a claim could be perfected after 2/25/20, absent due diligence on that date by the claimant and the work was continued with due diligence until that claim was perfected. Finding (2) may not be stated in a correct manner from a technical standpoint and this finding may lead one to the erroneous assumption that pre-1920 claimants had up to February 5, 1987 to perfect their claims. See Cochran v. Bonebrake (57 I.D. 105). In this decision, the DOI interpreted Sect. 37 of the Mineral Leasing Act to require that a valid discovery of oil shale was necessary on 2/25/20, or on that date the mining claimant was in diligent prosecution of work leading to a discovery. Consequently, it is quite clear that pre-1920 claimants long ago ran out of time to perfect their claims.

With regard to finding (3), it appears that the sense of the finding is not valid in that no claimant would be eligible to reduce the claim to patent unless it was validly perfected years ago and kept valid thereafter up to the present. For all practical purposes, the Mineral Leasing Act provisions in Sect. 37 never contemplated that a claimant could perfect a pre-1920 claim some 66 years later. The Mining Law, as supplemented by the Oil Placer Act, contemplates that only valid claims satisfying the applicable Federal and State laws can be patented.

With regard to finding (4), following the words "...Act of 1872..." add "as supplemented by the Oil Placer Act of 1897." While the Mining Laws contemplated development of mineral resources, there was *no* requirement that a claimant actually produce minerals from a claim within any stated period, i.e. the claimant could just sit on the claim. But, failure to develop an oil shale placer mining claim for *66 years* must constitute evidence that the claimant never perfected a valid discovery on each claim (exposed a valuable mineral deposit on each claim) prior to 2/25/20 (or within the time prescribed in the rule in *Cochran*); or if, a valid discovery had been perfected timely on each claim, that the discovery had been lost in the period subsequent to 2/25/20 to the present. In *U.S. v. Frank W. Winegar*, et al., 81 I.D. 370, at page 377-378, there are cited numerous cases relating to *loss of discovery*. Further, failure to develop would raise the inference that the claim was not located for *bona fide* mining purposes and that if the claim had been validly perfected timely, the claim was abandoned sometime during the 66-year interval.

With regard to finding (5), I suggest that appropriate language be devised and added to show that whatever development occurred on any oil shale claims, those development efforts were terminated or abandoned by the claimant when oil prices declined to $0.10-0.20/bbl or thereabouts in the late '20's and early '30's in Texas and Oklahoma.

With regard to finding (7), it would be best to add at the end: "...because the DOI never developed a constructive and adequately funded, properly staffed program to determine the validity or invalidity of pre-1920 oil shale claims." Congress, with its oversight committees, never ascertained the full extent of the unresolved claim problems, but at one time did enact Public Law 585 (approved 1954) and Public Law 167 (approved 1955) towards attempting to address problems posed by oil shale claims as well as other claims.

With respect to finding (8), it would be inconceivable for the Federal Government to issue patents under the guise of pre-1920 mining claims considering their commonly-known invalidity. The Post Hearing briefs in Weber support the view that many claims were known commonly to be fraudulent, considering their history, as further set forth in certain old GLO investigation reports prepared in the late 20's and early 30's.

With respect to finding (10), the phrase "...conversion of valid oil shale claims..." assumes or raises the inference that there are such valid claims. In fact, it is doubtful that any Congressional committee objectively and fully investigating these claims could find a single valid one, if the mining Law and Mineral Leasing Act provisions were properly applied to the claims. Further, Congress, prior to the enactment of any oil shale claims bill, should recognize that many of the so-called claimants have failed to comply with terms and provisions of FLPMA, with respect to recordation of mining claims on or before 10/22/79 and other requirements. For example, see 43 C.F.R. 3833.1-1 and 43 C.F.R. 3833.2 (Evidence of assessment work, etc.). It is imperative that H.R. 1039 contain language to make it clear that any claim deemed conclusively abandoned and void on which the recordation requirement of FLPMA has not been timely complied with cannot be treated as a valid oil shale claim.

An additional finding should be added that reads as follows: "The decisions in cases known as TOSCO v. Hodel 611 Fed. Supp. 1130 (U.S.D.C. Colo. 5/1/85), Freeman v. Summers, 52 L.D. 201 (1927), and Andrus v. Shell Oil Co. 446 U.S. 657 (1980) misconstrued the intent of Congress contemplated in U.S. Mining Laws (as supplemented by the Oil Placer Act of 1897), the Mineral Leasing Act of 1920, and their application to pre-1920 oil shale mining claims. Further, the decisions are so flawed or so erroneous that they are not to be used or followed in the proper administration of said laws to these claims."

On this issue, it is suggested that you insert in the hearing record on H.R. 1039 the following documents: The draft brief prepared by the Regional Solicitor's Office Staff in regard to TOSCO v. Hodel, which brief Chairman Udall was able to secure from DOI prior to his hearings last Fall; the briefs in Weber which Bill Shafer has; a copy of memorandum dated 2/12/78 to Associate Solicitor, Division of Energy and Resources from Regional Solicitor, Denver, entitled "Recommendation to Petition the Supreme Court for a Writ of Certiorari to the Court of Appeals for the 10th Circuit in Shell Oil Co. v. Andrus, etc.", and a copy of a memorandum dated 6/16/80 to the Solicitor, from the Acting Regional Solicitor, Denver, regarding a petition for rehearing of Andrus v. Shell Oil Co. Copies of these latter two memoranda should be obtainable from

Mr. Shafer. The second part of the Post-Hearing Brief in *Weber* has an appendix to it which exposes *Freeman v. Summers* in about 50 pages. Also, *Freeman v. Summers* was exposed fully in the 1600-page brief and appendix in *U.S. v. Winegar et al.*, which Russ Shay should have or should know where you can get a copy.

The Supreme Court in *Andrus v. Shell Oil Co.* apparently did not know precisely that there were three discovery-related charges in each of the contest complaints in contests 359 and 360. The second charge in the contest complaints related to loss of discovery, if a valid discovery had been perfected prior to February 25, 1920 on each of the claims. (Note: The three charges in the complaints in contests 359 and 360, quoted on pages 372-373 of 81 I.D. (1974) were not tied specifically to each of the claims in said contests but it was intended certainly that the three charges stated in the complaints applied to each of the claims covered by each respective complaint. Fuzzy language in a contest complaint charge may obscure the fact that a valid discovery is required for each claim before the claim can be deemed patentable, assuming "all else is regular".)

On the issue of loss of discovery, there is nothing in *Andrus* to even indicate that the Supreme Court was aware of this important issue that needed to be decided. There is no express holding in *Andrus* on loss of discovery. The majority opinion of the Court, written by then Chief Justice Burger, did not zero in on the question of whether, on *each of the claims*, there existed a "valid discovery of a valuable mineral deposit" to satisfy the U.S. Mining Law. Instead, the majority opinion apparently raised the issue as to whether oil shale was valuable in general. No one would question that oil shale deposits have speculative market value or may be valuable in some distant future.

But, as the Acting Regional Solicitor pointed out in his June 16, 1980, memorandum urging a petition for a rehearing of *Andrus v. Shell Oil Co.*, the Supreme Court was confused when it endorsed the erroneous "prospectively valuable" principle for oil shale over the "present marketability" principle used generally in the Mining Laws as a measure in determining whether valid discovery had been achieved on a claim. Economic developments since 1980 as oil companies dropped out of oil shale development show that oil from oil shale cannot be produced competitively for the market on a commercial basis.

Moreover, the Court was further confused because it never required a discovery on each claim.

The issues raised by the three charges in each of the complaints in Contests 359 and 360 as to each of the claims that got to the Supreme Court in Andrus, essentially got lost in the conduct of the litigation in a manner that the U.S. Supreme Court apparently did not know that there were three charges in each Contest Complaint in said contests that needed to be decided as to each of the claims in Andrus. Charge B., relating to loss of discovery, in each of the contest complaints in Contest 359 and 360 was not addressed at all in Andrus. Was this due to defective representation of the United States by DOJ in the litigation culminating in Andrus? Congress should investigate to find out what happened to the loss of discovery charge because discovery, if any, validly perfected, was certainly lost (on each of the claims) due to long run changes in economic circumstances from 1924 through 1940, when oil got down to less than one dollar a barrel.

It should be noted that some of the claims in Contests 359 and 360 did not become the subject matter of the decision in Andrus since neither the Government nor the private parties appealed even though the hearing examiner found the claims to be lacking in a Freeman v. Summers kind of discovery, as these claims did not have on them visible exposed oil shale deposits.

It should be noted that the DOI did not use all the charges that it could have used in Contests 359 and 360, and this failure was a severe blunder in DOI's operations. In the record of the hearing on Contest 359 and 360 there was adequate evidence to show that many claims had been abandoned. The Committee should be aware that some of the claims in Andrus subsequent to Andrus were patented by the BLM when in fact the BLM should have brought additional contest proceedings on the Andrus claims on other charges. The Committee should investigate why BLM issued the patents on some or all of the Andrus claims.

With regard to Sect. 2 of H.R. 1039: The term "any valid oil shale claim" is used but there is no definition of it in the bill. There may be no valid claims if the Mining Laws are properly applied, but the provisions in Sect. 2 seem to imply that there are valid claims. There is a risk that the provisions in Sect. 2 would be used to permit the issuance of patents on all oil shale claims on which there are pending patent applications as of 2/5/87.

With regard to (b)(1) on Sect. 2, it is pertinent to find out whether Chairman Rahall and others contemplate letting DOI follow the erroneous decision in TOSCO v. Hodel as a basis for determining a "valid oil shale claim". If that should be the case, then Mr. Rahall, et al. have set in motion a bill (assuming enactment) that will likely cause an additional estimated 13,000 acres of oil shale lands in Colorado to be given away in addition to the 82,000 acres covered by the Agreement of August 4, 1986.

Prior to any enactment of a bill relating to pre-1920 oil shale claims, it is necessary for Congress to require DOI to spell out in a definitive analytical memorandum for the Committee as to what constitutes a "valid pre-1920 oil shale claim" together with an analysis which will definitively set forth as to what constitutes an "invalid pre-1920 oil shale claim."

As a matter of law, the Secretary of DOI could not have permitted private interests to reduce to private ownership under the U.S. Mining Laws all the lands containing oil shale deposits in the States of Colorado, Utah and Wyoming which heretofore have been allowed to go to patent because there is so much oil shale that it would be inconceivable that on each claim there existed a "valuable mineral deposit", within the meaning of the Mining Laws as they are generally applied. Oil shale should not be an exception to the "prudent man rule." See Castle v. Womble, 19 L.D. 455, 457 (1894). The Congress should so provide by enacting an appropriate bill on this point.

With respect to (b)(2), converting an invalid claim to a lease can easily constitute an unwarranted giveaway. There are apparently some 260,000 acres of public domain covered by oil shale claims which might be converted to leases under this section in the States of Colorado, Utah, and Wyoming. Again, it is necessary for Congress, the DOI, and the public to understand what constitutes a "valid oil shale claim" that can be converted. If the Committee itself does not know what constitutes a valid claim in 1987, it has no business in sponsoring legislation to open up oil shale lands to be given away by way of leases under the guise of "valid claims" being surrendered to the U.S. Are there any regulations in 43 C.F.R. for issuance of oil shale leases in exchange for mining claims? However, the DOI adopted regulations for the issuance of oil shale leases on 3/10/20 (See Oil Shale Regulations - Act of February 25, 1920 [41 Stat. 437], 47 L.D. 424). At the end of the regulations in 47 L.D. 424 there is a form of an oil shale lease. The regulations and lease form may well be antiquated and need revision to protect the public interest.

These regulations contain no discussion of the meaning of Sect. 37 of the Act. However, DOI adopted regulations for issuance of oil and gas leases on 3/11/20 which interpreted Sect. 37 of the Act and which identified certain oil and gas placers which could not be patented. (See regulation 32, 47 L.D. 437 at 462 [1920]). Sect. 37 of the Act was interpreted by the DOI as not validating so-called "paper locations" of placer mining claims (See Digest of Decisions and Opinions in Connection with the Administration of the Act of February 25, 1920 as Applied to Oil and Gas, 47 L.D. 463, 467-472 [1920]).

Sect. 21 of the Mineral Leasing Act (41 Stat. 437) at 446 reads in part: "... Provided, That any person having a valid claim to such minerals (oil shale) under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation...." The provisions in (b)(2) should be revised to conform with the date of 1/1/19; otherwise (b)(2) will become an amendment of the Mineral Leasing Act provisions quoted above, and possibly qualify additional pre-1920 claims that might be relinquished for oil shale leases.

One of the questions that needs to be resolved is related to whether or not successors in interest to persons having a valid claim on 1/1/19 will be entitled to a lease if the claim is decreed to be valid.

The provisions in Sect. 21 for relinquishment of a claim for a lease, have long ago become antiquated and the provisions for such should be repealed by Congress. Congress never intended or contemplated in enacting Sect. 21 in 1920 that such authority in the Act be used in 1987 as a basis to accept the relinquishment of a long ago abandoned claim as a basis to issue a lease to the successors-in-interest to a person who had a claim as of 1/1/19 that could be deemed a valid one. Congress must be aware that the DOI, through the old GLO in the 20's and 30's contested numerous claims on the charge of failure to do annual assessment work. Decisions of the GLO and DOI which declared thousands of pre-1920 null and void effectively may have eliminated many of such claims. The old decisions of the GLO and DOI which declared certain claims null and void would likely be upheld by the U.S. Supreme Court in light of the decision in Hickel v. TOSCO in those situations where contest complaints were served properly on each contestee.

The provisions in (b)(2) do not include anything to require the BLM to publish a notice similar to notices required for patent applications (e.g. in 30 U.S.C. 29). People who can be adversely affected by the issuance of a lease should have an opportunity for notice, comment, and protest.

V. Comments unrelated to the bill:

The provisions in 43 C.F.R. Subpart 3863 (Placer mining claim applications) are deficient and fail to impose on a pre-1920 oil shale claimant to supply in affidavit form the information necessary to assist DOI to reach a determination about validity.

The regulations in 43 C.F.C. Subpart 3863 may be deficient in that the provisions in 43 C.F.R. 3862.4 -- Publication Notice, apparently are not made applicable to placer mining claim applications. Also, apparently the BLM did not publish proper notice of application of patent for some of the 525 claims to comply with provisions in 30 U.S.C. 29, covered in the August 4, 1986 agreement. Congress needs to check this out carefully.

Special provisions should be adopted by DOI for pre-1920 claims in such a manner as to make any applicant come forth with evidence to show that the claim is in fact a valid one. In this connection, the Administrative Procedure Act of 1946, as amended, clearly puts the burden of proof on the proponent to show he is entitled to what he is seeking from the Government. Any and all decisions of DOI whether by Administrative Law Judges, by the IBLA, or by the DOI prior to IBLA or by the Courts in conflict with the Administrative Procedure Act should be set aside by a bill enacted into law by Congress (pertaining to oil shale land administration).

VI. Conclusion

In view of the comments above, H.R. 1093 should not be enacted into law without Congress first taking action to really investigate the DOI's and DOJ's deficiencies in the handling of oil shale land matters and their failure to properly protect the public interest from the past and present threats to the Federal oil shale lands under the guise of pre-1920 oil shale claims. The bill does not face up to the huge challenges Congress faces on oil shale matters.

The DOI and DOJ have failed in properly protecting the public interest in Federal oil shale lands.

After Hickel v. Tosco, (1970), the 10th U.S. Circuit Court of Appeals, Denver remanded pending oil shale cases to the U.S. District Court, Denver, and the District Court remanded to DOI. The DOI had an unusual opportunity to contest such oil shale claims on the basis of all available, pertinent charges and, subsequently, through the DOJ, to defend final Interior decisions on oil shale claims in the Courts. Unfortunately, the DOI failed in filing adequate charges in contest complaints, investigating pre-1920 claims, in preparing and presenting evidence in contests and in Court cases and in adequately informing the U.S. Courts as to the true facts on how earlier decisions in cases such as the first oil shale patent in the early 1920's and in the Freeman v. Summers decision in 1927 had failed to properly follow the applicable Mining Laws then in effect. The ultimate travesty was the failure in 1986 of DOI and DOJ to pursue the appeals of Tosco v. Hodel (1985) and related actions in the U.S. Circuit Court of Appeals, 10th Circuit, and on up to the U.S. Supreme Court, if needed.

As a result, the deficient and questionable rulings in Tosco v. Hodel were used by the DOI and DOJ as an excuse for agreeing to issuing patents on some 82,000 acres of oil shale lands in Colorado in accordance with the terms of the agreement of August 4, 1986. Transfer of these lands under the agreement have been consummated on most of the 82,000 acres, by the BLM.

The Congress should take these major steps to assure that the national interest in public oil shale lands is protected: (1) Forthwith authorize and carry out an in-depth review and investigation, using all its available investigatory facilities, of the adequacy of DOI and DOJ investigation, preparation, and litigation -- from the initial contests to the consummation of the Agreement of August 4, 1986 -- on the 525 pre-1920 oil shale claims covered by the Agreement. (2) Immediately embargo any further patents on pre-1920 oil shale mining claims until the Congress completes its review and investigation of DOI and DOJ administration, management, and disposal of public oil shale lands. (3) Upon completion of its thorough review, revise existing laws as necessary to make sure that no more pre-1920 oil shale claims shall be patented unless they are fully and specifically found to have been valid on February 25, 1920 and have been maintained in a valid status continuously since then and are to be developed for profitable commercial production of oil shale within a stated statutory period or else the claim shall be conclusively deemed abandoned and void.

When the Agreement of August 4, 1986 on the 525 oil shale claims was reached by the Executive Branch, it recognized that Tosco v. Hodel cast a shadow over the administration of the Mining Laws generally. Therefore, provision was made for setting aside Tosco v. Hodel after patents on the 525 oil shale claims were conveyed. This raises major questions about the correctness of certain Judicial decisions.

Congress should investigate the role of the Judiciary in facilitating unwarranted disposals of the Nation's public domain oil shale lands based on the pretext of pre-1920 oil shale unpatented mining claims. This should specifically include the review of the factual and legal correctness of Federal Court decisions involving oil shale claims which apparently provided the supposed rationale for the Executive Branch to enter into the August 4, 1986 Agreement.

Prepared March 2, 1987.

May 26, 1987

TO:

FROM: Fred S. March, Temporarily at
Box 285
Erie, Colorado 80516

SUBJECT: Oil Shale Lands Mess in our Federal Government

Enclosed is a copy of my March 2, 1987 letter together with a 16-page document containing an analysis of the issues involved in pre-1920 oil shale mining claims and commenting on H.R. 1039 affecting them.

The originals of these two mentioned documents should be in the record of the hearings held on H.R. 1039 on March 3, 1987 before Chairman Nick Joe Rahall, Subcommittee of Mining and Natural Resources of The House Interior and Insular Affairs committee, House of Representatives. Mr. Jim Zoia, Staff Director of the Chairman Rahall's Subcommittee, told me over the telephone that these above mentioned documents were accepted by the Subcommittee for the record of the March 3, 1987 oil shale hearings.

Also the March 2, 1987 letter and the 16-page document were sent by me to Chairman Morris Udall, House Interior and Insular Affairs Committee.

I regret to inform you that the content of House Report 100-43, together with the substance of H.R. 1039 as reported by the majority of the House Interior and Insular Affairs Committee fail to face up to most of the major points made in the 16-page document regarding H.R. 1039 as it was introduced on February 5, 1987.

In my view, House Report 100-43 does not address adequately the oil shale mining claim problems, issues, and recommendations outlined in the 16-page document in order to protect the public interest in these multi-billion-dollar natural resources which rightfully should belong to all the American people. In short, H.R. 1039, if enacted into law as reported out of the Committee in House Report 100-43, is deficient.

H.R. 1039 will foreseeably make matters worse regarding future handling by the Department of Interior of outstanding pre-1920 oil shale claims because:

(1) H.R. 1039 and House Report 100-43 do not question the legality of the scandalous Agreement of August 4, 1986 which led to the disposal of 80,000 acres of public lands on the basis of erroneous prior Departmental and Court decisions which had not been properly litigated by the Justice and Interior Departments. The Committee does not question the correctness of the decisions in Freeman v. Summers (52 L.D. 201, 1927); Andrus v. Shell Oil Co. (400 U.S. 657, 1980); and Tosco v. Hodel (611 Fed. Supp. 1130, U.S.D.C., Colo., 5/1/85) -- all of which decisions misconstrued the intent of Congress contemplated in the U.S. Mining Laws and the Mineral Leasing Act of 1920.

(2) The bill provides no guidelines for future administrative proceedings and fails to specify on what legal criteria the Department of Interior shall adjudicate the validity of remaining pending claims.

(3) This bill also fails to stipulate that it should be the burden of the claimant to show that his claim meets the statutory and legal requirements for validity in all respects in conformity with applicable provisions in the Administrative Procedures Act. Indeed, under this bill, the Department of Interior could end up having to bear the entire burden of proving that claims filed over 67 years ago are invalid.

(4) In effect, H.R. 1039 would permit the Secretary of the Interior to resume further giveaways of the federal oil shale lands under the pretext of "valid pre-1920 claims" by means of ~~patents~~ and/or leases, particularly since the Department would not have sufficient time to make proper, factual determinations as to the validity of all claims within the impractical and unreasonable 2-year deadline set by this bill and still properly comply with the Administrative Procedures Act.

new rights under old claims [illegible] 4-21-87 by ESM

(5) The granting of leases in exchange for questionable, 67-year-old mining claims is likely to shortchange the U.S. Treasury and the American people, particularly since under Section 21 of the outdated Mineral Leasing Act there is no requirement for the lessees to pay any bonuses for the leases. The amount of rentals, if any, and the amount of royalties, if any, to be paid to the United States under proposed leases needs to be fully ascertained by Congress and re-evaluated, if necessary, by the way of appropriate amendments to the Act. It is noted that H.R. 1039, as reported, would eliminate acreage limitations for leases specified under present law. This aspect of the bill can lead to undue concentration of control over oil shale deposits by one company or operator.

It should be noted that House Report 100-43, 100th Congress, 1st Session, can in itself mislead Congress. This is because the report does not address adequately the mismanagement in our Federal Government involving oil shale lands from 1920, if not before, to the present, as highlighted in the 16-page document (and in the briefs and other materials referred to in the 16-page document).

House Report 100-43 fails to specify adequately the numerous charges which should be used by the BLM in contest complaints on pre-1920 oil shale unpatented mining claims in validity determinations.

The House Interior and Insular Affairs Committee has failed to conduct an adequate investigation in 1986 and 1987 to explore the known erroneous disposals of oil shale lands, the mishandling of oil shale mining contests, and the defaults in litigation by our Federal Government. The Government's failure to carry through properly on *Tosco v. Hodel*, and on the underlying administrative proceedings in the Department, is a recent glaring example of a major default which neither the House Subcommittee nor the parent Committee has adequately investigated, certainly not in the field at Denver. The Committee should inquire whether it is true that attorneys expert on oil shale, in the Denver Interior Regional Solicitor's Office, are not used by BLM on oil shale matters -- and, if so, whether this is proper public administration.

In essence, scandal upon scandal in the mishandling of our Federal oil shale lands and their reserves over many years has been neglected or not adequately explored by the House Interior and Insular Affairs Committee. (See 16-page document and the supporting materials referred to in the document. Also see the various depositions in *U.S. v. Mobil and Equity Oil*, Civil Action No. 4135, U.S.D.C., Colo., a case involving an erroneously issued patent, compromised by the Government favorably to the oil companies.)

The investigative staff of House Appropriations Committee conducted in the fall of 1986 an inquiry into the scandal involving the August 4, 1986 Agreement, but it is uncertain whether a report will be issued on the findings as a result of said review. It is probable that the House Interior and Insular Affairs Committee is not privy to the preliminary findings of the investigative staff of the House Appropriations Committee. The oil shale lands scandal in our Federal Government should not be swept under the rug by any Committee of Congress or by the whole Congress.

In these circumstances, H.R. 1039 as reported by the House Interior and Insular Affairs Committee in House Report 100-43 is premature for passage by the House of Representatives and should be defeated by the House and/or referred by the House back to House Interior and Insular Affairs Committee for further investigation and necessary corrective action.

However, I believe it would be appropriate for the House at this time to pass a bill with the language as contained in S. 597 introduced on February 26, 1987 by Senator Melcher for himself, Mr. Johnston, and Mr. Wirth.

I also recommend additionally, that Congress also by appropriate legislation create a Joint Senate - House Investigations Committee for the purpose of investigating how the Federal oil shale lands have been mishandled by our Federal Government, following the lines of investigation suggested in the 16-page document, including additional respects as may be deemed appropriate by the Committee. This proposed investigations committee should be empowered, with the assistance and participation of qualified staff from the GAO, to investigate the mishandling of oil shale matters in the Executive Branch, the Judicial Branch, and the Legislative Branch of our Federal Government in the period 1920 to the present. The legislation creating such a committee should authorize (and, if possible, appropriate) funds of at least $2 million for the committee to use in making its investigation and report to Congress within a period of 2 years. The report should detail the procedural and legal errors made in the past in carrying out the intent of the Congress and then specify what remedial legislation should be enacted to clean up the oil shale mess involving the Nation's Federal oil shale lands. The Committee should be staffed with competent people knowledgeable and experienced with matters involving the adminstration of U.S. Mining Laws and the Mineral Leasing Act of February 25, 1920, as amended.

I can provide names of competent and experienced individuals -- including a mining engineer and lawyers -- who can help Congress on such review.

Readers of this letter should note that in the period of late 1954 to 1964, I did a lot of work on oil shale matters -- leading to administrative proceedings and Court litigation -- while I was an attorney in the Regional Solicitor's Office, U.S. Department of the Interior, Denver Federal Center. I am no longer employed by the Federal Government or by anyone else and I am not in the private practice of law. My concern is the protection of the public interest.

I hope to be returning to the State of Washington before long. Mail after July 1, 1987 can be sent to me at P.O. Box 742, Ocean Shores, Washington 98569. Meanwhile, I can be reached before 9:00 A.M., Denver Time, on 1-303-828-3976.

(I suggest that members of Congress and their concerned staffers, should read Burl Noggle's book -- "The Teapot Dome Scandal and Politics in the 1920's", The Norton Press, 1965 --, to get a better idea as to how to cope with the oil shale scandal and mess in our Federal Government.)

Fred S. March

2605 Stanford Ave.
Boulder, CO 80303
April 15, 1988

The Honorable Senator John Melcher, Chairman
Senate Subcommittee on Mineral Resources
Development and Production
Room 362, Dirksen Building
Washington, D.C. 20510

Dear Chairman Melcher:

Enclosed is a statement presenting my opinions and observations on S. 2089, the Oil Shale Claims Conversion Bill, for your Subcommittee Hearings now scheduled for April 22. I request that this statement, with the attending Exhibits which support it, be included in your printed Hearings for the public record.

I enclose two complete sets with all the Exhibits -- plus five additional copies of my Statement without Exhibits.

For your Subcommittee's information this advice to the Congress is a public interest statement grounded in more than a quarter of a century's observation of oil shale pressure politics. I served earlier for over a quarter of a century in the BOB/OMB in the Executive Office of the President as a career civil servant. Since leaving the Government I have been a Professor of Public Affairs at the University of Colorado, now assigned to the Denver Campus. My comments are intended to serve the public interest and are not intended to interfere with any claimant's legitimate rights.

I would appreciate being advised what action you take on this matter. Please send me copies of all the Subcommittee's reports, reported bills, and hearings on Oil Shale -- including the record of your October hearings when printed. Please insert this letter in your printed hearing along with my statement on the bill.

Respectfully,

Michael S. March

Michael S. March, Ph.D.
(303) 494-4871

Enclosures *

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* Retained in official Committee files.

Statement for the
Senate Subcommittee on Mineral Resources
Development and Production
On S. 2089 Relating to
Conversion of Oil Shale Claims

by

Michael S. March, Ph.D.

April 22, 1988

This statement presents my comments on S. 2089, the bill which Senators Melcher and Wirth have introduced to permit holders of oil shale mining claims filed before February 25, 1920 to convert them to leases under certain terms or to continue to keep such claims active by doing regular assessment work. I request that these comments along with the supporting exhibits, be printed in your hearings on this legislation.

I question whether the public interest in the potentially extremely valuable oil shale lands of the country would be properly protected by permitting holders of mining claims which have not been developed in 68 years to tie up these lands with leases or continuing old mining claims. There is extensive information in earlier Interior Department briefs and draft briefs and statements prepared by competent Interior attorneys in the Denver region, some of which I cited in my letter to your Subcommittee dated October 14, 1987, which suggests that the 1986 "Settlement" in which the Department of Interior turned over 82,000 acres to claimants for $2.50 an acre was in error. I have heard Senator Timothy J. Wirth, in a public meeting severely criticize the Department of

Interior for its actions in that "Settlement" and ensuing disposals.

Bearing in mind the purposes and the specific provisions of S. 2089, 100th Congress, 2nd Session, relating to the "conversion" of oil shale mining claims filed before February 25, 1920, I do not believe this bill is defensible or in the public interest for the following reasons:

1. It would permit present holders of such pre-1920 claims to gain firm control of oil shale deposits in some 270,000 acres of Federal oil shale lands in the States of Colorado, Utah, and Wyoming. I estimate that some 100 billion barrels of potential recoverable shale oil, now worth about $20 a barrel, would be contained in these lands. Is such a huge preemption by the oil shale interests necessary, or prudent, in view of their present huge holdings of undeveloped shale, especially since these are some of the last lands covered by claims and they have apparently produced no commercial shale oil since the enactment of the Mineral Leasing Act of February 25, 1920. How much time do they need?

2. Under the bill "any valid oil shale claim" is covered by its provisions -- but it contains no requirement that the Department shall determine which claims for which "elections" are filed are indeed valid. Is the Congress assuming that any and every unpatented oil

shale mining claim is _ipso_ _facto_ valid? I believe such an assumption is contrary to the existing laws on mining claims and contrary to the facts which can be ascertained as to the claims. It is ridiculously contrary to the interest of the American public.

It is noted here for the benefit of the Subcommittee and full Committee that it is likely that the GLO and the Department of the Interior declared null and void many of the claims covering the 270,000 acres of land on the charge of failure to do assessment work in the 20's and early 30's. In 1964, the Department held that such unappealed decisions rendered claims of this kind invalid on _res_ _judicata_ grounds where _proper_ service was made upon the contestees in such old contests. (See _Union_ _Oil_ _Co._ _of_ _California_, 71 I.D. 169 (1964), Supp. 72 I.D. 313 (1965). Also see _U.S._ _v._ _E.R.T.L.,_ _Inc.,_ 74 IBLA 117, (June 30, 1983).) Accordingly, such old decisions should not be disregarded by the Subcommittee in its consideration of this bill; also the Interior Department should not disregard such decisions in determining what constitutes a "valid" pre-1920 oil shale claim.

I urge that Congress not attempt to validate by its bill claims which have already been effectively eliminated in earlier administrative proceedings in the Interior Department -- or ones that would be declared null and void and disallowed if contests were filed and properly prosecuted against them. The Congress no less than the Secretary of Interior should act as Trustee for the American people on these natural resources which some day will be of immense industrial and national security value, when finally processes become available for economic extraction of the oil locked in this ancient shale rock. That day has not arrived even though the oil companies and others have extracted hundreds of thousands of acres of oil shale lands from the public domain for negligible considerations to the U.S. Treasury.

3. The bill has no provision to require the Secretary of Interior to determine the validity of each and every oil shale mining claim on which the holder makes an "election" to obtain a "lease" or to maintain the continuance of the claim by performance of some token annual assessment work until the time for production arrives as provided in the bill.

Is this bill a means for the Department of Interior to make "valid claims" out of dubious claims, some of which may have been declared null and void and many of which may have been abandoned years ago when oil in Oklahoma and Texas sold for less than $1 a barrel? Many of these claims were bought for tiny sums because they were not economically feasible for mining, as Interior briefs have demonstrated.

4. Impossible, unrealistic deadlines are set in the

bill -- 180 days for making "elections" and only 60 days thereafter for the Secretary to issue a lease for 20 years or longer if one is elected. Why the pressure in the bill for "instant" leases?

Also no explicit provision is included so the bill for the claimant to relinquish the mining claim if a lease is elected.

Furthermore, the bill stipulates no milestones and timetables that a lessee should meet in moving towards production before the end of the 20 year term of the lease. The rental and royalty provisions for a lease should be spelled out clearly in the bill so the American people can have an appreciation of whether the public Treasury will realize a fair return from a lease. Is a copy of the proposed lease available?

Likewise, the token requirement of $1,000 of annual assessment work for a claim is not consequential in relation to the intrinsic value of the resources in these lands.

The development work requirements and lease payments on continued mining claims should be set high enough so only lands on which oil shale development is seriously being undertaken will be held by claimants through leases or old claims. The purpose of the mining claims was to promote development of minerals for the commercial market -- and hitherto this has not been achieved from oil shale lands despite disposals of at least 430,000 acres by the Department of Interior. But no commercial production ensues. This should be the real test for any oil shale claim. Why turn these oil shale deposits over to private interests if no production of shale oil from each of the claims is occurring?

The bill fails to specify criteria that a "valid" claim must meet. Are present-law criteria to continue?

The bill has no requirement for a ceiling on the number of acres of oil shale lands a company or an individual may have under lease. I believe this would be poor public policy because it will foster an oil shale monopoly. A modest ceiling should be specified to assure competition and prevent undue enrichment.

Section 2(b)(1) of the bill fails to define what constitutes "commercial quantities."

Section 2(c)(3) fails to define "significant marketable amounts" of oil from shale.

Specific definitions should be provided for these terms which set meaningful targets and protect the public interest in real development of oil productions from oil shale.

The production requirements in the bill are generally flabby. They should be given muscle.

5. S. 2089 seems to be based on the presumption that the remaining pre-1920 oil shale mining claims, which

total some 270,000 acres, are still valid. I have no knowledge of any real investigation by the Congress of the United States or its Subcommittees which factually validates this presumption. As far as I can determine, this bill is the product of pressure group politics which have attended the oil shale issue since Congress during the years 1908 to 1920 temporized while the lands were plastered with huge numbers of speculative oil shale mining claims which competent people have believed have never met the requirements of the U.S. Mining Laws -- and which many holders failed to maintain the claims through the years in compliance with law.

6. Judge Sherman Finesilver's 1985 decision in TOSCO v. Hodel (611 Fed. Supp. 1130, U.S.D.C. Colorado, May 1, 1985) provided the purported basis for the 1986 "Settlement" leading to subsequent disposal of 82,000 acres of oil shale lands. TOSCO has been vacated by the Circuit Court of Appeals, 10th Circuit, in Denver. This was done, I understand, on the basis that the decision was so mischievous with respect to U.S. Mining Laws generally that it was untenable. How could TOSCO have served as a valid reason for the Settlement? The Congress should find out what authority the Government had for this "Settlement" and who directed it.

I believe that since this decision has been in fact set aside as though it had never existed, that all prior mining law precedents which apply to oil shale claims are now in effect. I believe it is unwise policy for the Congress to modify present law by S. 2089 as, in my opinion, pre-1920 unpatented oil shale mining can be effectively contested and declared null and void in appropriate mining contest proceedings.

Therefore, I suggest that your Subcommittee take the position that the Department of Interior should adjudicate any outstanding oil shale claims under the laws that now apply after TOSCO v. Hodel has been vacated if such claims are submitted for a lease or for continuation of the claim. Moreover, I recommend that the Congress direct the Department of Interior by law that each and every claim which may be submitted for an "election" must be contested on all available and applicable charges and that the Department must make a full investigation of the validity of such claim on each and every charge -- and only extend the claim or grant a lease if the claim is determined to be valid.

7. A lengthy draft appeal brief on TOSCO v. Hodel was prepared by competent attorneys in the Denver Regional Solicitor's Office of the Department of Interior prior to the 1986 "Settlement." As far as I can ascertain that "Settlement" was in disregard of the findings in the draft brief that the rulings in TOSCO v. Hodel were in error on fact and on the mining law. I recommend that

your Subcommittee procure a copy of that draft brief and insert it in your hearing record so the public may know the specific respects which the brief presented on fact and on law regarding the errors in TOSCO v. Hodel.

If the Government had heeded my warnings in 1975 (Daily Congressional Record, December 18, 1975, pp. H13046-8) before then Representative Wirth's Subcommittee, huge values would have been saved for the U.S. Treasury, which surely needs the money now. (See Exhibit I, enclosed for the record.)

8. I am concerned that Congress, without adequate investigation of the facts and the legal aspects of the 1986 "Settlement," has been taking action which in effect gives the color of statutory validity to that "Settlement" and also sets the stage for further pre-empting of the oil deposits under old mining claims, or their encumbrance by leases of oil shale deposits for a long time without specifying adequately the lease terms. Some 11,000 acres were exempted from the then embargo by provisions in P.L. 100-71 to the issuance of oil shale mineral patents on July 11, 1987.

Let me point out that only a fraction of the 524 claims covered by the "Settlement" were specifically litigated in the contests addressed by TOSCO v. Hodel. Afterward many other claims were thrown into the "Settlement." Thus there is no assurance to U.S.

taxpayers that the "thrown in" claims met proper criteria for patents. Did the Government simply capitulate on the "thrown in" claims? If it did, on what statutory authority?

9. A report by the staff in the Survey and Investigations Unit of the House Appropriations Committee prepared in February 1987 calculates that the 82,000 acres disposed by the Department of Interior in 1986-87 contained an estimated 42 billion barrels of recoverable shale oil. This involved a potential loss of rentals, royalties and bonuses in future years, when oil shale may be developed, of as much as $210 billion to the U.S. Treasury, of which 50% would be due to the State of Colorado. (See Exhibit II.)

The issue of such vast values was never surfaced by the Department of Interior prior to the 1986 "Settlement Agreement." The Congress has not adequately investigated the "Settlement" in its public hearings.

10. The Subcommittee is informed that in the Hearing on Oil Shale Claims and on H.R. 1039 held on March 3, 1987, before Chairman Nick Joe Rahall II, House Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs, that BLM Director Burford appears to have misconstrued the holdings in the U.S. Supreme Court decision in _Andrus v. Shell Oil_, 446 U.S. 657 (1980) and in the 1927 Interior

Department decision, Freeman v. Summers, 52 L.D. 201, insofar as such holdings apply to pre-1920 oil shale claims. In this connection, please see the contents and analysis applicable to said decisions contained in the draft appeal brief relating to TOSCO v. Hodel prepared by attorneys in the Regional Solicitor's Office, DOI, Denver. Also, see the Appendix, pages 137 through 153 (hereby incorporated into this statement by reference) to the above-mentioned Hearing of March 3, 1987.

I believe the Senate Committee hearing of 1931 held on Freeman v. Summers and related matters held under S. Res. 379 did not examine the correctness of the standard set out in Freeman v. Summers. Likewise, I do not believe that then Committee Chairman Gerald P. Nye advised the Department to proceed with patenting under the Freeman v. Summers standard as represented by Mr. Burford. Your Committee should request Mr. Burford to submit a definitive brief by qualified attorneys in the Denver Regional Solicitor's Office analyzing his broad contentions to the House Subcommittee on pages 19-30, and particularly on pages 29-30 of his printed testimony.

11. I recommend that before any further action is taken by the Congress to encumber the remaining public domain oil shale lands embraced in pre-1920 oil shale claims with preemption under claims or leases under questionable terms, that the General Accounting office

should be asked to make a full review of past disposals as to their compliance with all requirements of the mining laws which have governed U.S. mineral lands. My letter to you of October 14, 1987, which I have been told was inserted in your prior hearing record of October 16, 1987, spells out a concrete basis for such a review. I hope you heed my recommendation.

It is public knowledge that the Reagan administration has a strong bias toward privatization of the Government. In the instance of oil shale, it indulged that bias on a multi-billion-dollar scale in 1986 by failing to carry proper appeals of the error-laden TOSCO decision to the U.S. Circuit Court and up to the Supreme Court, if necessary. The Congress has the duty to oversee and investigate questionable actions by the Executive Branch. This has not been properly done by the Congress thus far in this case. I recommend that the Congress request the GAO to make a full audit of the 1986 "Settlement" for compliance with applicable laws and regulations and applicable departmental and court precedents.

12. I wish to call the attention of your Subcommittee to a remarkable coincidence between the Teapot Dome scandal and what has happened on subsequent oil shale land disposals. Excerpts from an Interior brief, which I herewith submit as Exhibit III for insertion in your hearing record, describes how First

Assistant Secretary of Interior, E. C. Finney, in 1927 personally overruled other Interior Department staff and wrote the Freeman v. Summers decision after the Secretary of Interior was visited by a huge delegation of "power brokers" from Colorado who had pecuniary interests in oil shale claims. That decision has subsequently been the cornerstone of practically all subsequent disposals of pre-1920 oil shale mining claims by issuance of patents. However, Interior Department attorneys and mining engineers have developed convincing evidence that Mr. Finney's decision is erroneous with respect to the geological structure of oil shale and as to the law of discovery for oil shale mining claims. The enclosed Exhibit III demonstrates this. For a more complete analysis, you should study the draft appeal brief (182 pages long) prepared by attorneys in the Regional Solicitor's Office, DOI, Denver, applicable to TOSCO v. Hodel, which can be obtained by the Subcommittee from the Interior Department.

Now in recent research I have discovered that Mr. E. C. Finney was the keeper of the Teapot Dome lease papers for Secretary of Interior Fall who was sent to jail for taking bribes for the Teapot Dome leases. He also literally destroyed the career of Ralph Kelley, a dedicated career employee who opposed him. Published information derived by researchers from Congressional hearings shows that Mr. Finney misled the public and the Congress at one stage by stating that no lease had been made on the Teapot Dome oil land -- but that subsequently he personally delivered the actual lease to investigators, who ultimately secured the conviction of Secretary Fall and the recovery of large amounts of money for oil removed under leases that were set aside for fraud. See also enclosed Exhibit IV relating to Freeman v. Summers.

I should point out that the money involved in the Teapot Dome Scandal was a bagatelle compared to the sums involved in the oil shale land disposals since then. The disposals have been largely engineered as a result of Mr. Finney's erroneous decision -- which he wrote contrary to recommendations of the professional staff in the Department and is now known to be erroneous. (See M. R. Werner, Privileged Characters, New York: Robert M. McBride and Co., 1935, pp. 60-61, 64-65, and 75 and M. R. Werner and John Starr, Teapot Dome, New York: The Viking Press, 1959, p. 185, Also, see Walter Lippman in Exhibit IV.)

13. In the light of the foregoing I again urge that your Committee and the Congress of the United States make a full factual investigation of past Department of Interior disposals of oil shale lands to determine whether the claims which were patented met all the requirements of the U.S. Mining Laws. It seems to me that multi-

billion-dollar amounts of oil shale lands, containing hundreds of billions of barrels of potential recoverable shale oil have been disposed. Now more lands are being proposed for encumbrance, without a clear determination by the Congress that its laws have been met in the making of earlier disposals.

History makes it clear that ordinary prudence dictates that your Subcommittee, together with House Committees, should thoroughly investigate whether in fact the claims covering the 270,000 acres can by any reasonable determination be confirmed as being valid under present laws -- and this prior to formalizing appropriate new legislation.

I believe that the American public is entitled to know whether such valuable lands -- which figures such as former Senator Paul Douglas and President Lyndon B. Johnson believed could finance the repayment of much of our U.S. public debt or create a trust fund to finance education in the United States for the future benefit of the youth of our country -- have been managed properly in the public interest. It would be a disservice of huge proportions for your Subcommittee and the Congress not to defend the public interest in U.S. oil shale lands.

In the meantime I recommend that your bill for leasing or continuing mining claims on remaining public oil shale lands be withdrawn; that the Congress enact a statutory embargo on any further disposals of oil shale lands; and that the Congress meanwhile direct a complete and full investigation of prior oil shale land disposals before definitive new legislation is attempted. You may very well find that existing mining laws, if properly administered and fully enforced, will protect the public interest in oil shale lands and give just treatment to holders of old mining claims. Otherwise, if your proposed bill is enacted, huge amounts of oil shale deposits are likely to be encumbered -- and in later years, through successive pieces of legislation extending claims and leases, ultimately end up in private hands.

Having worked many years in the legislative area, I know how the process of attrition of the public interest works as the Congress capitulates to interests seeking to exploit the public domain. I suggest that the entire Subcommittee read what Senator Bob La Follette said on the Senate floor during the debates on the Mineral Leasing Act.